SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

GINARTE GALLARDO GONZALEZ & WINOGRAD, LLP

Plaintiff,

-against-

WILLIAM SCHWITZER, WILLIAM SCHWITZER & ASSOCIATES, P.C., GIOVANNI C. MERLINO, BARRY AARON SEMEL-WEINSTEIN, BETH MICHELLE DIAMOND, RENE G. GARCIA, THE GARCIA LAW FIRM, P.C., MIGNOLIA PENA, AND JANILDA GOMEZ,

Defendants.

----------X

Index No: 159991/2018

Motion Seq. Nos. 01, 04

Hon. James d'Auguste

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO THE SCHWITZER DEFENDANTS' MOTION TO DISMISS AND IN SUPPORT OF CROSS-MOTION TO DISMISS COUNTERCLAIM

CLIFFORD S. ROBERT
MICHAEL FARINA
ROBERT & ROBERT PLLC
526 RXR Plaza
Uniondale, NY 11556
(516) 832-7000
Attorneys for Plaintiff Ginarte Gallardo Gonzalez & Winograd, LLP

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

New York Statutes

Federal Statutes

Rules

Treatises

Plaintiff GINARTE GALLARDO GONZALEZ & WINOGRAD, LLP ("Plaintiff" or "Ginarte") respectfully submits this memorandum of law in opposition to the motion of defendants WILLIAM SCHWITZER ("Mr. Schwitzer"), WILLIAM SCHWITZER & ASSOCIATES, P.C. (the "Schwitzer Firm") (together, "Schwitzer"); GIOVANNI C. MERLINO ("Mr. Merlino"), BARRY A. SEMEL-WEINSTEIN ("Mr. Semel-Weinstein"), and BETH M. DIAMOND ("Ms. Diamond") (together the "Schwitzer Defendants") for an order dismissing the Plaintiff's claims against the Schwitzer Defendants (the "Motion"), and in support of Plaintiff's cross-motion to (a) dismiss the Schwitzer Defendants' counterclaim sounding in defamation as barred by the absolute litigation privilege established in the common law of New York and/or the statutory fair-reporting privilege codified in New York Civil Rights Law § 74, and (b) award Plaintiff such other and further relief as this Court deems just, equitable and proper (the "Cross-Motion").

PRELIMINARY STATEMENT

Ginarte, a highly-regarded personal-injury law firm with a long history of successfully representing clients in the New York/New Jersey area, herein alleges that *all* of the Defendants engaged in an orchestrated conspiracy to illegally solicit and steal present clients from Ginarte using unlawful means and, in the process, tarnish Ginarte's stellar professional reputation.

Mr. Schwitzer and the Schwitzer Firm led this conspiracy, involving classic ambulance-chasing. The means of the conspiracy included, but was not limited to: Defendants and their agents appearing unsolicited at doctors' offices, offering patients/clients cash to retain Defendants as substitute counsel for Ginarte in their personal-injury cases; and falsely denigrating Ginarte's skills, abilities, experience, honesty and integrity as part of a high-pressure sales pitch to vulnerable and seriously-injured people. Defendants' unlawful, coordinated and

elaborate scheme is not only damaging to the profession but has inflicted serious financial harm upon Ginarte, and threatens to continue to do so in the immediate and foreseeable future.

Ginarte's pleading, and the evidence presented in Ginarte's supplemental submissions herewith, which include affidavits from Ginarte's clients and employees, recording transcripts, telephone records, and written statements, paint a grim picture of the Defendants and support all of the Plaintiff's causes of action.[1] Having been caught red-handed with both hands in the proverbial cookie jar, with the crumbs still on their faces and chocolate still on their hands, the Schwitzer Defendants feign indignation and deny what they have done. Worse yet, they have brazenly submitted knowingly false and perjurious statements to this Court, and rely upon the equally perjurious statements of their co-defendants, hoping that Ginarte cannot disprove their disingenuous denials. However, Ginarte has the evidence to prove all of its claims and disprove all of the Defendants' baseless and false denials. The Schwitzer Defendants' Motion should therefore be denied, and Ginarte's Cross-Motion to dismiss the preposterous defamation counterclaim should be granted.

Ginarte's Claims

Tortious Interference: The Schwitzer Defendants along with defendants Rene G. Garcia ("Mr. Garcia"), The Garcia Law Firm, P.C. (the "Garcia Firm") (together the "Garcia Defendants"), Mignolia Pena ("Mignolia" or "Ms. Pena") and Janilda Gomez ("Janilda," "Jenny" or "Ms. Gomez") (together the "Runner Defendants") (collectively the "Defendants") interfered with Ginarte's contractual relations with its clients, employing wrongful and illegal

[1] The Court of Appeals has made it clear that a Plaintiff is entitled to supplement the pleadings with affidavits and other evidentiary materials in response to a motion to dismiss, to remedy any defects in the pleading. *See Cron v. Hargro Fabrics*, 91 N.Y.2d 362, 366 (1998). "Plaintiffs' additional submissions ... used to supplement the pleadings ... must also be given the benefit of every favorable inference." *Williams v. Sidley Austin Brown & Wood, LLP*, 15 Misc. 3d 1125(A) (Table; text at 2007 WL 1203594, at *4 (Sup. Ct. N.Y. County Apr. 24, 2007)) (citing *Cron*, 91 N.Y.2d at 366).

means designed to purposefully harm Ginarte's business, including but not limited to: violations of the anti-solicitation (§§ 479 and 482); the attorney-misconduct (§ 487) provisions of the New York Judiciary Law; violations of the federal Racketeer Influenced and Corrupt Organizations ("RICO") statute; defamation; and acts of unfair competition. Suffice it to say that the Defendants' conduct also violated multiple provisions of the New York Rules of Professional Conduct which the defendant attorneys in this case are bound by. The Schwitzer Defendants and Garcia Defendants used "case runners" to intercept Ginarte clients at their doctor's office, offer them free transportation and cash payoffs, and falsely denigrate Ginarte's skills and experience, all to get them in the door of the Schwitzer Firm where the attorneys could "reel them in" – a scheme of improper and unlawful solicitation, high-pressure sales tactics, collusion and deceit. This is clearly tortious interference with Ginarte's contractual relations with its clients.

Judiciary Law § 487: The allegations in the Complaint establish a "chronic and extreme pattern of legal delinquency" on the part of the Defendants that includes, *inter alia*, improper solicitation of Ginarte's clients in violation of the law and legal ethics, and establish that attorneys in the Schwitzer Firm were involved in such activities dating as far back as 2006. Contrary to the Schwitzer Defendants' argument, the "party injured" by a violation of section 487 need not be a party to an action in which the misconduct was committed; rather, the statute targets patterns of misconduct that undermine the integrity of the judicial system by attacking and defrauding the courts as well as litigants, and may be violated even where the attempt at fraud is unsuccessful. It is difficult to image a violation of this statute that is clearer and more blatant than that of the Defendants.

Defamation: The Defendants and their employees and/or agents defamed Ginarte by explicitly and unambiguously accusing its attorneys and employees of criminal conduct,

specifically, of stealing millions of dollars in settlement funds from its clients by lying to them about the value of their settlements. The Plaintiff's supplemental submissions clearly and explicitly establish the particulars of these defamatory statements; what was said, by whom, to whom, when, and where. These statements are not "hyperbole" or "opinion"; they were explicit accusations at the very least of the crime of grand larceny, both in general and with reference to at least one specific incident. This is textbook defamation.

Unfair Competition: The Defendants would have this court believe that "competition" between attorneys could never be deemed "unfair" – even when using improper and illegal tactics in the process which misappropriate the labors, skills and expenditures of Ginarte by wrongfully soliciting its clients after significant work on their cases had already been performed. Ginarte spends millions per year and devotes significant business resources to attract clients, investigating and initiating their cases, and the process of litigation and settlement, not to mention advertising and marketing. The Defendants have unfairly and wrongfully usurped and exploited Ginarte's significant investment in its own business, and are therefore liable for unfair competition.

Unjust Enrichment: There can be no doubt that the Defendants have profited at Ginarte's expense from their scheme to improperly solicit and steal Ginarte's clients through connivance, deception, cash payoffs, false Office of Court Administration filings, and other unlawful and unethical tactics, and that Ginarte has thereby involuntarily conferred a benefit on the Defendants that equity and good conscience do not permit them to keep. Contrary to the Schwitzer Defendants' assertion, the Complaint and the Plaintiff's supplemental submissions adequately demonstrate that the parties had a connection that was "not too attenuated" to support this cause of action.

Civil RICO: The pleadings and supplemental submissions establish that the Defendants used the U.S. Mail and wires as part of a scheme to obtain a business advantage by means of false or fraudulent pretenses, representations, or promises, and are therefore guilty of multiple federal offenses. These predicate acts of racketeering included the mailing of substitution letters to Ginarte and the courts, and the payment via wire to Uber for car services, in furtherance of the foregoing scheme. Moreover, contrary to the Schwitzer Defendants' assertion, Ginarte has standing to pursue a Civil RICO claim based on mail and wire fraud even if the Defendants' use of the mail and wires in furtherance of their criminal enterprise was directed at someone else, inasmuch as Ginarte was injured in its business as a direct result of it; and, the law punishes the *scheme*, not its *success*.

Conspiracy: New York law allows a plaintiff to plead the existence of a conspiracy in order to connect the actions of the individual defendants, acting in concert with one another, with an actionable, underlying tort, and establish that those actions were part of a common scheme. The Complaint and the supplemental submissions establish at least three cognizable torts, at least one criminal misdemeanor, and at least two federal criminal offenses. Moreover, they create a nexus of conduct and intent amongst all of the Defendants. That these materials paint a picture of a conspiracy is not just a favorable inference; it is an unmistakable inference.

Permanent Injunction: Because this cause of action is dependent on the merits of the substantive claims asserted herein, dismissal at this stage would be premature. Nevertheless, the Complaint and supplemental submissions adequately plead a cause of action for permanent injunction, demonstrating an ongoing violation of Ginarte's rights, a substantial likelihood that it will continue and cause serious and irreparable harm, and that only an injunction can stop it.

* * *

In sum, the pleadings and supplemental submissions leave no room for doubt that the allegations in the Complaint describing a calculated and unlawful scheme of collusion and deceit engaged in by *all* of the Defendants named herein, for their own gain and at Ginarte's expense, are legitimate, and the Court should therefore deny the Schwitzer Defendants' motion to dismiss. The submissions also eliminate any possibility that this lawsuit is a "sham" maliciously instituted *solely* for the purpose of defaming the Schwitzer Defendants, which in turn invalidates their counterclaim.

THE TRUE FACTS IN THIS CASE

The following recitation of facts refers to the allegations in Plaintiff's Complaint (NYSCEF No. 2) ("Complaint" or Compl."), and to the evidentiary materials annexed to the accompanying Affirmation of Clifford S. Robert, Esq. ("Robert Aff.") submitted herewith to supplement the pleading.[2]

The Parties

Ginarte is a law firm with offices in New York and New Jersey, whose team of over 30 attorneys has over 150 years of combined experience helping injured clients navigate the legal system and obtain the compensation they deserve for construction and motor-vehicle accidents, medical malpractice, premises liability, workers' compensation, Social Security Disability and other personal-injury matters. (Complaint (NYSCEF No. 1); (Affidavit in Support of Randy Mastro (Feb. 7, 2019) (NYSCEF No. 21) ("Mastro Aff.") Ex. A (NYSCEF No. 22)) ("Complaint") ¶¶ 5, 17.) Ginarte's founder, principal and senior partner, Joseph A. Ginarte, Esq. ("Mr. Ginarte"), a member of the New York State Trial Lawyers Association, has been

[2] *See Cron*, 91 N.Y.2d at 366; *Williams*, 2007 WL 1203594, at *4.

practicing law for 36 years, has served on the Board of Directors for the New York Academy of Trial Lawyers, has been listed as one of the Top 100 Trial Lawyers by the National Trial Lawyers, and received numerous awards from legal advocacy and publishing organizations. (*Id.* ¶ 19.)

The Schwitzer Law Firm, formerly known as Dinkes & Schwizer, P.C., is a personal-injury law firm with offices in Manhattan, including a location at 820 2nd Avenue, 10th Floor, New York, New York 10017. (Compl. ¶ 7.) Mr. Schwitzer is its principal; Mr. Merlino, Mr. Semel-Weinstein, and Ms. Diamond are attorneys. (*Id.* ¶¶ 6, 21.) Mr. Garcia is a sole practitioner, and the principal of the Garcia Firm. (Compl. ¶¶ 11, 25.) Mr. Garcia and the Garcia Firm have a business relationship with Mr. Schwitzer and the Schwitzer Firm, and maintain an office at the Schwitzer Firm's 2nd Avenue address in Manhattan. (*Id.* ¶ 28.) Defendants Mignolia Pena ("Mignolia" or "Ms. Pena") and Jenilda Gomez ("Jenilda," "Jenny" or "Ms. Gomez") are non-attorney "case runners" who work for the Schwitzer Firm. (Compl. ¶¶ 13-14, 29-30.)

Defendants' Unlawful and Unethical Scheme

In late June 2018, Ginarte began receiving substitution letters from the Garcia Firm and the Schwitzer Firm relating to four (4) of its high-value personal-injury clients, who left Ginarte to be represented by the Garcia Firm and the Schwitzer Firm. (Robert Aff. Ex. 2; *see id.* Ex. 3.) Ginarte's subsequent investigation revealed that each of the substituted clients had a common link: Ginarte referred each client, the victim of a construction accident, to the same pain-management specialist, Dr. Jose Colon ("Dr. Colon") at Rehabilitation Medicine Center of New York, P.C., located at 80 Maiden Lane, Suite 2100, in Manhattan ("RMCNY"). (*See* Compl. ¶ 34.) In addition, Ginarte's investigation revealed that the Defendants, particularly Ms. Pena, Ms.

Gomez and other unnamed co-conspirators, had been unlawfully soliciting clients of Ginarte at or in front of RMCNY's Maiden Lane office, enticing each to retain the Garcia and/or Schwitzer Firm as substitute counsel for Ginarte, by doing any or all of the following:

a) offering the client approximately $2,000 or $3,000 in cash;

b) offering to obtain financing for the case, and advising the client that (s)he would not have to pay back any loans previously taken out;

c) verbally falsely denigrating Ginarte specifically, telling the client *inter alia* that:

i) Ginarte is ill-equipped and/or incompetent to handle the case, that its attorneys lack the necessary expertise, experience, and/or interest in the client's legal rights and personal well-being, despite the fact that Ginarte employs a team of over 30 attorneys, has handled countless cases arising under the New York Labor Law, and has won over $1,000,000,000 for its clients;

ii) Ginarte is a "thief" or "super thief";

iii) Ginarte lies to its clients about the status of their cases and potential recoveries;

iv) Ginarte steals money from clients by taking more money out of a recovery than the client receives;

v) Ginarte, as a law firm, is analogous to "doctors that kill you."

d) offering to provide transportation via Uber to an attorney's office on 2nd Avenue in New York City;

e) offering to find a separate Workers' Compensation lawyer for the client, at the same address, on the same day;

f) offering to provide transportation via Uber between the doctor's and attorney's offices, and between the attorney's office and the client's home;

g) advising the client that an individual (including, on information and belief, Ms. Pena's daughter) will meet the client upon arrival at the attorney's office to take him "upstairs"; and

h) advising the client to "always tell the doctors that you're in pain".

(*See* Compl. ¶ 35.) If the targeted Ginarte client agreed, while present at or in front of RMCNY to meet with substitute counsel, immediately or at a later date and time, the targeted client would be provided with transportation via Uber to the Schwitzer Firm's offices and then back home. (*Id.* ¶ 36.) When the Uber vehicle picked up the targeted client, Ms. Pena, Ms. Gomez and/or other unnamed co-conspirators accompanied the client to the Schwitzer Firm. (*Id.*)

When the targeted Ginarte client arrived at the Schwitzer Firm, he or she would be greeted by an employee of the Schwitzer Firm who then directed him or her into a conference room where Mr. Merlino, Mr. Semel-Weinstein, Ms. Diamond, one or both of the Runner Defendants, and/or other unnamed co-conspirators were present. (Compl. ¶ 37.) Mr. Merlino, Mr. Semel-Weinstein, Ms. Diamond and/or other unnamed co-conspirators would then proceed to confront the targeted Ginarte client with high-pressure sales tactics, including but not limited to the extravagant promises described above, in an effort to persuade the client to retain substitute counsel. (*Id.*) If the client did not initially agree, Defendants would persist in applying additional high-pressure sales tactics and persuasion. (*Id.*)

Once the targeted Ginarte client agreed to retain Defendants as substitute counsel for Ginarte, Defendants would give him or her $2,000 or $3,000 in cash and immediately paid off any loans the client had previously taken out, refinancing those loans through a funding company affiliated with Defendants at a higher interest rate, all to the detriment of the client. (Compl. ¶ 38.) Mr. Schwitzer maintained a briefcase full of cash in his office, from which he made the foregoing cash payments to the targeted Ginarte clients, and also paid the Runner Defendants (as well as other unnamed "case runners") in cash.

A. Evidence of Defendants' Unlawful and Unethical Scheme

Set forth below is a summary of the evidence presented in Ginarte's supplemental submissions herewith, which includes affidavits from Ginarte's clients and employees, recording transcripts, telephone records, and written statements.

1. Client 1

In or around August 2018, Ginarte's client ("Client 1")[3], a patient of Dr. Colon's practice at RMCNY, was at an appointment for physical therapy when he was approached by an Hispanic woman, about five feet tall, with medium complexion, using a cane. (Robert Aff. Ex. 4, Affidavit of Client 1 (Oct. 25, 2018) ("Client 1 Aff.") ¶¶ 2-5; *see id.* Ex. 5.) The woman identified herself as "Carmen" and told Client 1 that her daughter worked for an attorney who could take his case. (Client 1 Aff. ¶¶ 5-6.) She further told Client 1 that the Ginarte firm are thieves, because they settle a client's case for ten to twenty million dollars and tell the client that it settled for a lot less, thus "stealing" the remainder of the settlement money. (*Id.* ¶ 7.) The woman claimed that Ginarte is a big firm that does not care about its clients, as further evidenced by the amount of advertising it does. (*Id.* ¶ 8.) She promised Client 1 that the attorney her daughter worked for

[3] To protect the affected clients, Ginarte has redacted their names from this submission.

would get better results than Ginarte, and offered Client 1 $2,000.00 cash if he signed up with the firm for which her daughter worked. (*Id.* ¶¶ 10-11.)

The woman also stated that if Client 1 signed up with these attorneys and if he had secured any loans from a third-party funding company, the attorneys would cover the loans so that he would not have to pay them back at the end of the case, i.e., that he would be free of that debt. (*Id.* ¶ 12.) She offered transportation via Uber to and from this attorney's office, which she said was located on 2nd Avenue right by the Queens Midtown Tunnel.[4] (*Id.* ¶ 13.) And, she gave Client 1 her phone number, (347) 545-7625, asking him to call her to arrange a date for him to be picked up and taken to this attorney's office. (*Id.* ¶ 14.) As an investigation by Ginarte, confirmed by a non-party subpoena Ginarte served on Sprint®, revealed, the telephone number (347) 545-7625 is a Sprint® mobile number that belongs to Defendant Mignolia Pena ("Mignolia"). (Robert Aff. Ex. 6, Sprint® Subpoena; Ex. 7, Letter from Sprint®, Michelle Bersbach, Corporate Security, Subpoena Specialist to Michael Farina (Jan. 16, 2019) ("Sprint Letter 1").

2. <u>Client 2</u>

It appears that this practice was in place well before 2018. On or around November 30, 2016, Ginarte's client ("Client 2") received a telephone call from a Spanish-speaking person identifying himself as a Schwitzer attorney, who said that he had gotten Client 2's number from a "friend." The Schwitzer attorney further said that Schwitzer obtain more money for him than Ginarte in less time, and promised that the Schwitzer Firm would pay off his funding loans until after the conclusion of the lawsuit. (Robert Aff. Ex. 9, Affidavit of Client 2 (Oct. 25, 2018) ("Client 2 Aff.") ¶¶ 2-3; *see id.* Ex. 10.) On December 1, 2016, a car picked Client 2 up and

[4] 820 2nd Avenue is located at 44th Street, about eight (8) blocks north of the entrance to the Queens Midtown Tunnel at 36th & 2nd.

took him to the Schwitzer Firm's office on 2nd Avenue near the United Nations building, where he was brought to a waiting room and waited about 30 minutes. (Client 2 Aff. ¶¶ 4-5.) Client 2 was then escorted to see an attorney, Defendant Beth Diamond ("Ms. Diamond"), who gave him her card. (*Id.* ¶ 5.)

With a translator present, Ms. Diamond told Client 2 that he had a great case and that Ginarte was not doing a good job, as there were other companies that it had not sued; that her firm would get him more money in less time, take care of his funding loans and get him a lower interest rate. (*Id.* ¶¶ 5-6.) Ms. Diamond also told Client 2 that her boss would give him $2,000.00 in cash for signing up with the Schwitzer Firm. (*Id.* ¶ 7.) Client 2 was then given papers to sign which he was told would have the effect of discharging the Ginarte firm from his lawsuit and Workers' Compensation case, and was driven home. (*Id.* ¶¶ 8-9.) Feeling uncomfortable about the matter and about the way Ms. Diamond had spoken to him, and feeling that they were trying to "buy" him and his case, he decided to remain with Ginarte and reached out to Ginarte to let them know. (*Id.* ¶ 10.)

3. <u>Juan Flores Hernandez</u>

On October 22, 2018, Juan Flores Hernandez, who is employed by Ginarte as a paralegal and intake representative, accompanied a Ginarte client to a medical appointment at the 80 Maiden Lane location. (Robert Aff. Ex. 11, Affidavit of Juan Flores Hernandez ("Flores Aff.") ¶ 5.) The purpose was to ensure that the client was not approached or questioned by employees of the Schwitzer Firm. (*Id.* ¶ 6.) While there Mr. Hernandez was approached by an Hispanic woman, appearing to be aged in her 40s or 50s, who identified herself as "Mignolia" and, apparently believing that he was a patient/client (most of the patients present at the time were Ginarte clients), asked him about his therapy, whether he was involved in an accident, and what body parts were injured. (*Id.* ¶¶ 7-9.) Mr. Hernandez decided to play along and told her that he

had been in a construction accident three weeks prior. (*Id.* ¶ 9.) She asked if he was represented by an attorney, he said no, and she said she could help but that no matter what he should not go with Ginarte, whom she called "scammers" and "robbers" out to "screw people" and "steal money." (*Id.* ¶ 10.) She told him that her daughter worked for an attorney and, if he came to the office which was near the U.N.[5] for a consultation and signed up, he would be given $2,000.00 cash. (*Id.* ¶ 11.) Mr. Flores told "Mignolia" that he would have to think about it; and she asked for his telephone number and gave him hers, (347) 545-7625. (*Id.* ¶ 12.) He gave her his phone number, (917) 756-9264, and a pseudonym, "Hector Robles". (*Id.* ¶ 13.) She told him that her daughter, "Jenny," would call him that night, and gave him Jenny's phone number, (646) 302-1102. (*Id.* ¶ 14.) Ginarte's investigation, confirmed by the non-party subpoena Ginarte served on Sprint®, revealed that this number is also a Sprint® mobile number, belonging to Defendant Janilda Gomez ("Jenny"). (Robert Aff. Ex. 6, Sprint Subpoena; *id.* Ex. 12, Letter from Sprint®, Amy Ware, Corporate Security, Subpoena Specialist to Michael Farina (Dec. 16, 2018) ("Sprint Letter 2").) Mr. Flores then went back to Ginarte's office and informed Mr. Ginarte of what had happened. (Flores Aff. ¶ 15.)

That night, at approximately 7:03 p.m., Mr. Flores received a call from (646) 302-1102. (Flores Aff. ¶ 16.) He recorded the call on his iPhone. (Flores Aff. ¶ 18; *see id.* Ex. 1.) The telephone records confirm a call from this number to Mr. Flores's number on this date and time. (*See* Robert Aff. Ex. 8, Sprint® call records ("Sprint Records") at 1.)[6] "Jenny" asked about his accident, then put "Mignolia" on the phone. (Flores Aff.¶¶ 16-17.) "Mignolia" reminded "Hector" that if he went to the appointment with the attorney she was promoting, he was not

[5] The Schwitzer Firm's office (*see supra* note 4) is one block west of United Nations Plaza and the U.N. Visitors Center.

[6] The Sprint Records indicate 7 calls from "Jenny" to Mr. Flores between October 22 and 23, 2018.

obligated to sign a retainer; the consultation was "to go and see what kind of lawyer he is." (Flores Aff. Ex. 1, Transcript of Telephone Recording (Oct. 22, 2018) ("Tel. Tr.") at 1.) "Mignolia" went on to state the following:

> Look, we took a young guy who was Ecuadorian, 2 years with Ginarte, because Ginarte is the biggest thief. ... [H]e had a lawsuit, one of them checked the computer for a lawyer that I took them to, that my daughter took them to. And, when he went, he did not get a lawsuit, what he got was [workers'] compensation.
>
> ...
>
> My son fell ... from a fourth floor in construction, and the lawyers said they had work now. That is a lawsuit to start from between $15 and ... $20 million. And what did they give my son? Well, he says that lawyer is a super thief, those lawyers. They [g]ave him $1,300,000 pesos.
>
> And, as Hispanics ... what they say there is that, I want to work with you. That they fill up our envelopes and also that is already a lot of money, because in our country, it is a lot. ... But that is nothing. I can buy a house here in Queens, in Brooklyn ... What is going to be left? Nothing. That is nothing.
>
> Nevertheless, they tell you: "See what their strategy is like?" ... They say: "Look at everything there is, they have it." Which means something like: "This is all there is, that is all there – if we go to court, you could lose it. And they make you think: "You, sign." ... For $1 million, let's assume, $300, $1,400,000 or $2 million. But, you do not know how many millions they are giving signing for them. ... And they are keeping that money ... [T]hey explain all this to you, when you go. ...
>
> [T]he lawyer is like a doctor. There are doctors that cure you, and doctors that kill you. ... And so, the same thing goes for a lawyer. ... There are good attorneys, there are lawyers that ... robbed my son. He fell four stories... My son should have gotten ... between $20 and $25 million, $15 to start. What they gave him was not money, because they are staying with all Hispanic people's money. ... [T]hat is why I am saying you should go to the appointment tomorrow and you will see. Look, I have worked with Ecuadorians, Mexicans. And, what they are doing is thanking God since they left there.

(Tel. Tr. at 1-2.)

"Mignolia" again reminded "Hector" that if he went to the appointment he would not have to sign, but if he did, "my daughter will give you 2." (*Id.* at 4.) He asked, "Give me 2 what?" (*Id.* at 5.) She replied, "$2,000 from us, $2,000 dollars." (*Id.*) He replied, "Oh, so you will give me $2,000.00." She replied, "Yes, tomorrow, when you sign. ... My daughter works with them [i.e., the lawyers] ... and she will give you the two thousand." (*Id.*) Mr. Flores said he would have to think about it, and asked who he should ask for if he decided to go to the appointment at the attorney's office. (*Id.* at 5-6.) She said, "My daughter is going to wait for you downstairs ... she will go up with you and bring you to the lawyer. ... She will send an Uber for you to take you to the where the lawyer is. ... She is going to be out on the street, waiting for you. When you arrive ... [s]he will take you up to where the lawyer is." (*Id.* at 6.) After identifying her daughter as "Jenny," she continued:

> She will send an Uber ... to where you are, to your house. So, you go and ... take a look, and you have the interview with the lawyer ... If you sign ... you already know that she will give you what we talked about.... downstairs when you leave, so she will sendyou back home in an Uber to again. ... You do not have to pay for a taxi or anything. No, the lawyers pay for all of this. ... And, every time they call you for appointments and all that, they will send ... an Uber to pick you up ... and it comes back and they will send you home...

(*Id*. at 7.)

"Jenny" called again the next morning from (646) 302-1102; Mr. Flores said he was not convinced. (Flores Aff. ¶ 19.) He then called her back and asked for a consultation with the lawyer; and she asked where he was, then she and her mother "Mignolia" picked him up in an Uber vehicle. (*Id.* ¶ 20.) They took him to 820 2nd Avenue, where "Jenny" called someone named "John" to confirm that he was in the office. (*Id.* ¶ 21.) "John" met them in the lobby, and they proceeded to the 10th floor where Mr. Flores observed the sign of the Schwitzer Firm. (*Id.* ¶ 21.) Mr. Flores was taken to a conference room where he met with two attorneys, Mr. Semel-

Weinstein and Mr. Merlino; "Jenny" and "Mignolia" were present at the meeting, and it appeared that the attorneys knew them. (*Id.* ¶ 22; *see id.* Ex. 2.) The conversation at the meeting was conducted principally in Spanish, with a translator present to translate back-and-forth between Mr. Flores, who spoke Spanish, and the attorneys, who spoke English. (*Id.* ¶ 23.)

Mr. Flores recorded the encounter on his iPhone. (Flores Aff. ¶ 24; *see id.* Ex. 3, Recording Transcript ("Recording Tr.").) When Mr. Flores was taken to the conference room, Mr. Semel-Weinstein[7] came in and said to Mignolia and Janilda, "Hi, good to see you guys." (Recording Tr. at 6.) "Mignolia" replied, "Hi. Nice to see you." Mr. Semel-Weinstein stepped out; "Mignolia" told Mr. Flores that "He is the lawyer, one of them." The two of them spoke until Mr. Semel-Weinstein returned, stated "My name is Barry Semel-Weinstein", and interviewed Mr. Flores at length, through the interpreter, about his accident and injuries. (*See id.* at 6-24.) "Mignolia" remained in the room and asked some questions as well. (*See id*.) Mr. Flores again provided the pseudonym "Hector Robles" (*id.* at 24) along with other personal information. (*See id.* at 24-26.) He advised Mr. Semel-Weinstein that he wanted to discuss it with his wife before making a decision. (*Id.* at 26.)

Mr. Merlino[8] then introduced himself as "one of the partners in the firm," and advised Mr. Flores that he had "an action for workers' comp[ensation] ... [a]nd potentially for a lawsuit." (*Id.* at 26-27.) Mr. Merlino also noted that Mr. Flores' immigration status "doesn't matter." (*Id.* at 33.)

Mr. Flores reiterated that he would prefer to talk with his wife; Mr. Merlino suggested, "The best thing is to have her come in." (*Id.* at 34-35.) He said he would "maybe" call back "in

[7] Mr. Flores confirmed Mr. Semel-Weinstein's identity from his picture on the Schwitzer Firm's website. (Flores Aff. ¶ 22, Ex. 2.)

[8] Mr. Flores identified Mr. Merlino from his picture on the Schwitzer Firm's website. (Flores Aff. ¶ 22, Ex. 2.)

1 or 2 days"; "Mignolia" chimed in saying, "Because you need surgery and you need doctors and without compensation nothing is going to pay..." (*Id.* at 35.) The interpreter said to Mr. Merlino, "They're explaining to him workers compensation, he needs it. And he needs to pay his bills." Mr. Merlino said, "Yeah, they're going to cover that for you. ... The law is the law." (*Id.*) Mr. Merlino went on to describe his firm's reputation "of going to trial," whereas "[a] lot of lawyers like to settle their cases" which "we only" do "when we do it together. ... and if it's for the right amount." (*Id.* at 35-36.) He told the attorneys again that he would talk to his wife get back to them. (*Id.* at 36-37.) After he left the meeting, he returned home in an Uber vehicle for which he was told "John" had pre-paid. (Flores Aff. ¶ 25.)

Two days later on October 25, "Mignolia" saw Mr. Flores again at the 80 Maiden Lane location. (Flores Aff. ¶ 26.) They did not speak. (*Id.*.) That evening, at 5:49 p.m., she called him from (347) 545-7625 (Mignolia's mobile number) and again offered him the opportunity to sign up with the Schwitzer Firm, this time offering a $3,000.00 cash payment, saying she would give him the money downstairs once he signed up. (*Id.* ¶ 27.)

In light of the foregoing, the Schwitzer Defendants' reliance upon Mignolia's and Janilda's knowingly false statements under oath (i.e., their affidavits) which state, "I have never personally met William Schwitzer, Giovanni Merlino, Barry Aaron Semel-Weinsten, or Beth Michelle Diamond, or had any contact with them", is offensive and clearly and demonstrably perjurious. (Robert Aff. Ex. 1, Affidavit of Mignolia Pena (Jan. 11, 2019) (NYSCEF No. 25); *id.*, Affidavit of Janilda Gomez (NYSCEF No. 26)). The sworn denials in the Schwitzer Defendants' verified answer fare no better. (*See id.*, Schwitzer Defendants' Verified Answer, Affirmative Defenses and Counterclaim (Feb. 7, 2019) (NYSCEF No. 24) ¶ 7; *id.* at 21-25.) The Schwitzer Defendants' statement that Ginarte would not "dare to verify" its allegations for "fear of criminal

prosecution" is equally outrageous and offensive. **It is now clear to a forensic certainty that the Schwitzer Defendants have knowingly suborned false statements**.[9]

Furthermore, the Defendants are hereby on notice that Mr. Flores is represented by counsel and, therefore, no effort should be made by Defendants' attorneys, or their agents or employees to speak with or contact him. *See* New York Rules of Professional Conduct 4.2 and 8.4(a).

4. Romeo Alvarado

On October 25, 2018, Romeo Alvarado, an employee of Ginarte, was assigned to accompany clients to appointments at the 80 Maiden Lane location. (Robert Aff. Ex 13, Affidavit of Romeo Alvarado (Oct. 25, 2018) ("Alvarado Aff.") ¶¶ 2-3.) As he waited for a client to finish his appointment with his doctor, he was approached by an Hispanic woman, about five feet tall, medium complexion, using a cane, who introduced herself as "Mignolia." (*Id.* ¶ 4.) Mr. Alvarado took pictures of Mignolia with his mobile phone. (*Id.*; *see id.* Ex. 1). Mignolia asked if he had had an accident at work; he told her he had, and she asked him to walk with her outside to a small park across the street from the building. (*Id.* ¶¶ 5-6.) Mignolia claimed that her daughter worked for an attorney to whom she could refer him. (*Id.*) Mignolia asked if his accident was work-related involving construction, and he replied that it was not, at which point she said the attorney would not take his case. (*Id.* ¶¶ 7-8.) Mr. Alvarado told Mignolia that he had friends who had been involved in construction accidents, and she offered to pay him $2,000.00 for each construction accident case that he referred to the firm. (*Id.* ¶ 9.) Mignolia said that the firm is located on 2nd Avenue near the United Nations, and asked him to call her daughter directly at (646) 302-1102 (Janilda's mobile number) whenever he had a referral. (*Id.*

[9] The Schwitzer Defendants' conduct violates Rule 8.4 of the New York Rules of Professional Conduct, and demonstrates their consciousness of guilt.

¶¶ 10-11.)

Furthermore, the Defendants are hereby on notice that Mr. Alvarado is represented by counsel and, therefore, no effort should be made by Defendants' attorneys, or their agents or employees to speak with or contact him. *See* New York Rules of Professional Conduct 4.2 and 8.4(a).

5. Client 3

During the week of October 22, 2018, Ginarte's client ("Client 3"), a patient of Dr. Jose Colon's practice at RMCNY, was approached at the 80 Maiden Lane location by an Hispanic woman, about five feet tall, medium complexion, using a cane. (Robert Aff. Ex. 14, Affidavit of Client 3 (Oct. 25, 2018) ("Client 3 Aff.") ¶¶ 3-5; *see id.* Ex. 15.) She told Client 3 that she had a niece who works for an attorney who could handle his case. (Client 3 Aff. ¶ 6.) She called Ginarte "thieves," saying that they settle a client's case for ten to twenty million dollars, and tell the client that it settled for a great deal less, so they could steal most of the settlement money. (*Id.* ¶ 7.) She also said that because Ginarte is such a big firm that does so much advertising, it does not care about its clients. (*Id.* ¶¶ 8-9.) She said that her attorney would get better results, and offered Client 3 transportation via Uber to this unnamed attorney's office. (*Id.* ¶¶ 10-11.) Client 3 thought this woman untrustworthy and did not engage in further conversation. (*Id.* ¶ 12.)

6. Client 4

During the week of October 22, 2018, Ginarte's client ("Client 4"), a patient of Dr. Jose Colon's practice at RMCNY, was approached at the 80 Maiden Lane location by an Hispanic woman, about five feet tall, medium complexion, using a cane. (*See* Robert Aff. Ex. 16, Affidavit of Client 4 (Oct. 26, 2018) ("Client 4 Aff.") ¶¶ 3-5; *see id.* Ex. 17.) She told Client 4 that she had a niece who works for an attorney who could handle his case. (Client 4 Aff. ¶ 6.) She called Ginarte "thieves," saying that they settle a client's case for ten to twenty million

dollars, and tell the client that it settled for a great deal less, so they could steal most of the settlement money. (*Id.* ¶ 7.) She also said that because Ginarte is such a big firm that does so much advertising, it does not care about its clients. (*Id.* ¶¶ 8-9.) She said that her attorney would get better results, and offered Client 4 transportation via Uber to this unnamed attorney's office. (*Id.* ¶¶ 10-11. Client 4 thought this woman untrustworthy and did not engage in further conversation. (*Id.* ¶ 12.)

7. Client 5

In or around October 2018, Ginarte's client ("Client 5"), a patient of RMCNY, was approached at the 80 Maiden Lane location by an Hispanic woman, about five feet tall, with a medium complexion, using a cane. (Robert Aff. Ex. 18, Affidavit of Client 5 (Oct. 26, 2018) ("Client 5 Aff.") ¶¶ 2-5; *see id.* Ex. 19.) She came over and sat next to him, and they struck up a conversation about real estate in the Dominican Republic that she was interested in buying. Client 5 told her that he knew of someone who could help, and they exchanged phone numbers; the number she gave him was (347) 545-7625. (Client 5 Aff. ¶¶ 6-8.) Later that night, she called from a different number; (646) 301-1102. (*Id.* ¶ 9.) As discussed above, these numbers belong to defendants Mignolia Pena and Janilda Gomez, respectively. (*See* Robert Aff. Exs. 7, 12.) She asked if he had a case and if so, who his attorney was. (Client 9 Aff. ¶ 9.) Client 5 replied that he had not given her his number to talk about personal affairs, and they ended the call. (*Id.* ¶ 10.)

B. Former Schwitzer Employee Corroborates Elements of the Foregoing Scheme

On October 26, 2018, a former employee of the Schwitzer Firm, provided a sworn written statement to Michael Malone, a Private Investigator for Sage Intelligence, at the Ginarte

firm's offices.[10] (Robert Aff. Ex. 20, Written Statement of Former Employee (Oct. 26, 2018) ("Former Employee Stmt.").) The former employee explained that in the three years he worked at the Schwitzer Firm, from July 2015 until May 2018, he and other firm staff were encouraged to attend medical appointments with firm clients, and that during these appointments they would ask other patients if they were happy with their present counsel. (Former Employee Stmt. at 1.) They would either tell the patient that they never heard of that attorney, or point out what that attorney was lacking, and either way tell the patient that Schwitzer is a "top 5" law firm and promise quicker Workers' Compensation payments if they retained Schwitzer as counsel. (*Id.* at 2-3.) They would also ask the patients how they got to their appointments; if they said public transportation, they would tell them they would provide an Uber for appointments. (*Id.* at 2.) In addition, they would "target or push for cases that would reap a large settlement." (*Id.* at 3.)

According to the former employee, Mr. Schwitzer also employs "runners" in all five boroughs of New York City, whose job is to "go to accident scenes and sign up clients[.]" (Former Employee Stmt. at 2; *see id.* at 3.) He identified one runner "who would sign clients up at either the hospital, accident scenes, or doctor appointments" (*id.* at 2), and another "who brings in Labor Law cases" (*id.* at 3). The former employee stated that he "once had a runner call [him] up and [ask] for money up for a case that was yet to be signed up or brought into the firm"; the former employee forwarded this call to Mr. Merlino, Mr. Schwitzer's partner. (*Id.* at 2.)

The former employee recalled a client in a construction accident case who had retained Ginarte in 2017 but "switched to Schwitzer because he received five thousand dollars up front." (Former Employee Stmt. at 3.) He also stated that Mr. Schwitzer "keeps a brief case [*sic*] in his

[10] As discussed herein, Mr. Schwitzer's former employee has stated that Mr. Schwitzer threatened him with "bodily harm"; as such, Ginarte has redacted his name from this submission and will provide it to the Court upon request.

office with a large amount of cash and he uses this cash to pay both clients and the runners." (*Id.* at 4.)

The former employee went on to state that Mr. Schwitzer threatened him with "bodily harm" and that he also observed Mr. Schwitzer threaten other employees of his firm. (*Id.* at 3-4.)

C. Ginarte's Investigation Reveals Past Misconduct Indicating a Long-Running Scheme to Unlawfully Solicit Clients by the Schwitzer Law Firm and Its Predecessor Firm, Dinkes & Schwitzer, P.C.

Publicly available information reveals that in or around March 2013 William R. Hamel ("Mr. Hamel"), an attorney at the Schwitzer Law Firm, was convicted upon his plea of guilty to the reduced charge of criminal facilitation in the fourth degree, a class A misdemeanor, in violation of Penal Law § 115.00(1), and was sentenced to a one-year conditional discharge, a $300,000 settlement in lieu of a fine, forfeiture or restitution, 150 hours of community service, and mandatory surcharges. *See Matter of Hamel*, 121 A.D.3d 332 (1st Dep't 2014). In or around August 2013 the Appellate Division, First Department, deemed Mr. Hamel's conviction a "serious crime" and referred the matter to the Departmental Disciplinary Committee for a sanction hearing. *Id.*

In May 2014, the Appellate Division, First Department, suspended Mr. Hamel from the practice of law for four months based upon his plea allocution in which he acknowledged that "in 2007, in the Bronx, after an injured patient was accepted as a personal injury client, [I] paid an employee at Lincoln Hospital for [ ] disclosing the patients information to [me]." *Id.* At the sanctions hearing, Mr. Hamel testified, *inter alia*, that while he was working for the predecessor Schwitzer Law Firm, William Dinkes became involved in a scheme of paying hospital employees $500 for referrals. *Id.*

In preparing for this litigation, Plaintiff obtained and inspected, pursuant to Judiciary Law Section 90(10), Mr. Hamel's publicly availably disciplinary file from the Appellate Division,

First Department, including the transcript of the hearing which took place on December 10, 2013 (Robert Aff. Ex. 21 ("Hamel Tr.")), and exhibits introduced at the hearing. At the December 10, 2013 hearing, Mr. Hamel testified that he worked for the law firm of Dinkes & Morelli from 1989 until 1998, when the firm was dissolved (Hamel Tr. 23:15-21), after which he, Ms. Diamond and Mr. Schwitzer went with Mr. Dinkes to a new firm in which Mr. Schwitzer "became a partner with Bill [i.e., William] Dinkes." (*Id.* 25:17; *see id.* 25:8-26:2, 27:9-16.) "[T]he new firm became Dinkes & Schwitzer." (*Id.* 27:7-8; *see id.* 139:4-140:2.) Dinkes & Schwitzer. P.C. was registered with the New York State Department of Corporations on February 24, 2006. (Robert Aff. Ex. 22.)

Mr. Hamel testified that he was "involved in the [Dinkes & Schwitzer] firm's criminal solicitation of personal injury cases" "from December of 2006 to September of 2007." (Hamel Tr. 30:24-31:4.) It began when Mr. Dinkes called Mr. Hamel into his office one day and asked him to go sign up a client at Lincoln Hospital, giving him the name of the patient, the patient's location in the hospital, the nature of the patient's accident and injury, and told him the patient would be expecting him. (*See id.* 31:10-24.) When he went to the hospital, after he met with and signed up the client (*see id.* 34:7-35:9), he was approached by a hospital employee, who took him aside to the hospital lounge, asked if he worked for Mr. Dinkes, told Mr. Hamel that he was the one who had referred the case to the office and asked, using words and hand gestures, who was going to "take care of" him "money-wise." (*See id.* 35:10-37:9.)

When Mr. Hamel returned to the office and relayed this experience to Mr. Dinkes, Mr. Dinkes seemed shocked. (*See* Hamel Tr. 38:5-39:13.) About a week later, Mr. Dinkes called Mr. Hamel into his office again, and asked him to go back to Lincoln Hospital to sign up another case. (*See id.* 39:14-40:14.) Mr. Dinkes then placed a quarter on his desk, told Mr. Hamel, "now

you're on retainer" and that he needed to "talk to you about something and I don't want anybody else to know about it." (*Id.* 40:18-21; *see id.* 40:16-22.) Mr. Dinkes went on to explain to Mr. Hamel that the hospital employee he had met, Mr. Balkaram, had been referring cases to Mr. Dinkes and that Mr. Dinkes would pay him for those referrals, then Mr. Dinkes took $500 in cash out of his pocket and told Mr. Hamel that this is what he would need in order to meet with Mr. Balkaram. (*See id.* 40:23-41:9, 43:9-14.) Mr. Dinkes told Mr. Hamel not to pay Mr. Balkaram in the hospital, but to do it at "a pizza place across the street." (*Id.* 44:17-22.)

When Mr. Hamel returned to the hospital a second time, although he did not sign up the client, he saw Mr. Balkaram and asked him to meet across the street at the pizza parlor. (*Id.* 53:3-54:14.) "[H]e knew I was coming so he was expecting me." (*Id.* 56:21-22.) They went to the pizza parlor, and Mr. Hamel gave Mr. Balkaram the $500. (*Id.* 57:4-20; *see id.* 151:14-21.)

Over the next nine months, Mr. Hamel would receive patient referrals from Mr. Balkaram, who called him with patient contact information about 50 times of which he followed up on about half, of which he signed up about a dozen of the referred clients, of which Mr. Balkaram was paid for six. (*See* Hamel Tr. 58:24-60:20, 61:21-64:22.) Mr. Hamel dealt with at least one other hospital employee as well during that time period, who was known to Mr. Dinkes and to at least one other person at the Dinkes & Schwitzer firm. (*See id.* 67:17-75:11, 79:22-81:24, 83:20-86:9, 89:21-90:23; *see also id.* 133:6-135:12.) Mr. Hamel would get the cash to pay this person from Mr. Dinkes. (*See id.* 86:10-23.)

The New York State Attorney General's Office raided the firm and brought charges resulting in the above-referenced plea. (*Id.* 92:21-93:9.) Mr. Dinkes passed away in September 2007. (Hamel Tr. 60:24-61:3; 91:9-13, 91:24-92:7.)

The firm's name change, from Dinkes & Schwitzer, P.C. to William Schwitzer & Associates, P.C., was filed with the New York State Department of Corporations on August 21, 2014. (Robert Aff. Ex. 22.) In addition, the letterhead on the Schwitzer Law Firm's stationery states that the firm, William Schwitzer & Associates, P.C., was "[f]ormerly known as Dinkes & Schwitzer, P.C." (Robert Aff. Ex. 2.)

D. Ginarte's Investigation Also Reveals Past Misconduct by the Garcia Defendants

In or around November 2007, Mr. Garcia was charged with professional misconduct by the New York State Grievance Committee of the Second Judicial Department. On March 24, 2009, Mr. Garcia was suspended from the practice of law by order of the Appellate Division, Second Department dated one month prior, based on a Special Referee's report sustaining ten (10) charges of professional misconduct, including *inter alia* converting client and escrow funds to his own use, failing to promptly pay clients their shares of personal-injury settlements, failing to keep proper records for his attorney trust account, and failing to file Closing Statements with the Office of Court Administration. *See Matter of Garcia*, 61 A.D.3d 169 (2d Dep't 2009). His reinstatement was held in abeyance and referred to the Committee on Character and Fitness to investigate and report on his fitness to practice as an attorney. *See* 2010 WL 775016 (2d Dep't Mar. 9, 2010). He was reinstated on October 12, 2010. *See* 77 A.D.3d 750 (2d Dep't 2010).

LEGAL STANDARD

On a CPLR 3211 motion to dismiss, the court must "'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.'" *Nonnon v. City of N.Y.*, 9 N.Y.3d 825, 827 (2007) (quoting *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994)); *see Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414 (2001); *N.Y. Tel. Co. v. Mobil*

Oil, 99 A.D.2d 185, 192 (1st Dep't 1984). "The complaint must be construed liberally, and the court must accept as true not only the complaint's material allegations but also whatever can be reasonably inferred there from [*sic*] in favor of the pleader." *P.T. Bank Central Asia, N.Y. Branch v. ABN AMRO Bank N.V.*, 301 A.D.2d 373, 375-76 (1st Dep't 2003) (citations and internal quotation marks omitted); *see* CPLR § 3026 ("Pleadings shall be liberally construed."). "In ruling on a motion to dismiss, the court is not authorized to assess the merits of the complaint or any of its factual allegations, but only to determine if, assuming the truth of the facts alleged, the complaint states the elements of [any] legally cognizable cause of action." *P.T. Bank*, 301 A.D.2d at 376.

In opposing a motion to dismiss, a plaintiff is entitled to supplement the pleading with additional evidentiary materials. *See Cron v. Hargro Fabrics*, 91 N.Y.2d 362, 366 (1998) ("In opposition to [a CPLR 3211] motion, a plaintiff may submit affidavits to remedy defects in the complaint[.]") (citation and internal quotation marks omitted); *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 635 (1976) ("Under CPLR 3211 a trial court may use affidavits in its consideration of a pleading motion to dismiss."); *Apple Records, Inc. v. Capitol Records, Inc.*, 137 A.D.2d 50, 58 (1st Dep't 1988) (quoting *Rovello*, 40 N.Y.2d at 635) ("[P]laintiffs have supplemented these pleadings with additional evidentiary materials, which we may review 'to preserve inartfully pleaded, but potentially meritorious, claims.'"). "Plaintiffs' additional submissions ... used to supplement the pleadings ... must also be given the benefit of every favorable inference." *Williams v. Sidley Austin Brown & Wood, LLP*, 15 Misc. 3d 1125(A) (Table; text at 2007 WL 1203594, at *4 (Sup. Ct. N.Y. County Apr. 24, 2007)) (citing *Cron*, 91 N.Y.2d at 366); *see Arrington v. N.Y. Times Co.*, 55 N.Y.2d 433, 442 (1982) ("[T]he allegations of a complaint, supplemented by a plaintiff's additional submissions, if any, must be given their most favorable

intendment.").

ARGUMENT

I. THE COMPLAINT AND PLAINTIFF'S SUPPLEMENTAL SUBMISSIONS STATE A CAUSE OF ACTION FOR TORTIOUS INTERFERENCE.

The Defendants interfered with Ginarte's contractual relations with its clients, employing wrongful and illegal means designed to purposefully harm Ginarte's business. The Schwitzer Defendants argue that the Complaint lacks particularity – which is not required for this cause of action – and that attorneys are essentially permitted to steal each other's clients without legal consequence, which is certainly not true. The pleadings and Plaintiff's supplemental submissions clearly demonstrate that this was not innocent competition or a simple matter of client choice; this was a coordinated and unlawful scheme.

"Tortious interference with contract requires [1] the existence of a valid contract between the plaintiff and a third party, [2] defendant's knowledge of that contract, [3] defendant's intentional procurement of the third-party's breach of the contract without justification, [4] actual breach of the contract, and [5] damages resulting therefrom." *Lama Holding v. Smith Barney*, 88 N.Y.2d 413, 424 (1996) (tabulation added); *see Kronos, Inc. v. AVX Corp.*, 81 N.Y.2d 90, 94 (1993). Because an attorney-client retainer agreement is terminable at will, a claim for tortious interference with such a contract must further allege wrongful means, i.e., that the defendant's conduct in interfering with the relationship "amount[ed] to a crime or an independent tort." *Law Offices of Ira H. Leibowitz v. Landmark Ventures, Inc.*, 131 A.D.3d 583, 585-86 (2d Dep't 2015) (citing *Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 190 (2004)). Ginarte clearly satisfies all of the elements for a tortious inference with contract claim. Ginarte had contracts with its clients, the Defendants were undoubtedly aware of those contracts inasmuch as they knew the clients were being represented by Ginarte, the Defendants intentionally procured the breach of those contracts

through wrongful means, and Ginarte has been damaged as a result thereof.

The Schwitzer Defendants argue, in essence, that lawyers and law firms are *allowed* to solicit and indeed steal each other's clients with impunity, by whatever means they desire – including illegal and unethical means – in the name of both "competition" and "clients' rights." This is simply not so.

A. In-Person Solicitation of Clients at the Direction or on Behalf of an Attorney, or "Ambulance Chasing," Is Illegal.

Section 479 of the Judiciary Law provides that in New York, "It shall be unlawful for any person or his agent, employee or any person acting on his behalf, to solicit or procure through solicitation[11] either directly or indirectly legal business, or to solicit or procure through solicitation a retainer, written or oral, or any agreement authorizing an attorney to perform or render legal services, or to make it a business so to solicit or procure such business, retainers or agreements." *See, e.g., People v. Hankin*, 182 Misc. 2d 1003, 1005 (Sup. Ct. App. Term 2d Dep't 1999) (quoting *People v. Schneider*, 20 A.D.2d 408, 410 (1st Dep't 1964)) (§ 479 prohibits "soliciting business on behalf of an attorney").

Section 482 of the Judiciary Law further provides that "[i]t shall be unlawful for an attorney to employ any person for the purpose of soliciting or aiding, assisting or abetting in the solicitation of legal business or the procurement through solicitation either directly or indirectly of a retainer, written or oral, or of any agreement authorizing the attorney to perform or render legal services." *See, e.g.*, *Matter of Kronegold*, 29 A.D.3d 236, 238 (2d Dep't 2006) (sustaining

[11] The New York Rules of Professional Conduct, 22 NYCRR § 1200, define solicitation as "unsolicited communication by a lawyer or law firm, seeking to represent an injured individual" (Rule 4.5(b)), "by in-person or telephone contact, or by real-time or interactive computer-accessed communication" (Rule 7.3(a)(1)), or "any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients ... the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain" (Rule 7.3(b)).

charge alleging that attorney "employed or paid a non-lawyer to solicit retainers to perform legal services in violation of ... Judiciary Law § 482"); *People v. Kramer*, 132 A.D.2d 708, 709 (2d Dep't 1987), *aff'd* 72 N.Y.2d 1003 (1988) (evidence that defendant had "a network of 'chasers' who referred automobile accident victims to his law office" supported violation of § 482); *see also Matter of Ravitch*, 82 A.D.3d 126, 132 (1st Dep't 2011) ("directing a non-attorney employee to attempt to wrest a retainer out of a clinic patient" violates §§ 479 and 482). In the context of section 482, "an attorney can be charged with implied knowledge of the acts of an agent[.]" *Matter of Rapport*, 186 A.D.2d 344, 347 (3d Dep't 1992). Moreover, "improper solicitation may be found even though the potential client actually wanted and needed a lawyer," and "may be deemed conduct prejudicial to the administration of justice." *Id.*

Violation of either of these sections is a class A misdemeanor. Jud. L. § 485; *see Matter of Ehrlich*, 252 A.D.2d 73, 74 (1st Dep't 2007) ("[A]n attorney who hires someone to solicit clients for him ... [is] guilty of a misdemeanor."). Simply put, solicitation of the kind alleged herein is a crime.[12] Accordingly, contrary to their claim, the Schwitzer Defendants may not use illegal means to solicit Ginarte's clients.

B. The Schwitzer Defendants Employed Wrongful Means to Solicit Ginarte's Clients and Potential Clients.

Similarly, lawyers are not free to prey on their competitors' clients using wrongful means that go beyond mere lawful persuasion and that purposefully harm their competitors' business

[12] *See also* Jud. L. §§ 480, 481. The United States Supreme Court, in *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978), upheld the prohibition against in-person solicitation of legal business against constitutional attack, based on the important state interests that support the ban. The Court therein noted that "[a]lthough our concern in this case is with solicitation by the lawyer himself, solicitation by a lawyer's agents or runners would present similar problems." *Id.* at 465 n.22; *see U.S. v. Occidental Chem. Corp.*, 606 F. Supp. 1470, 1474 (W.D.N.Y. 1985) ("[T]he Supreme Court [in *Ohralik*] recognized that the state's interest in protecting lay persons from overreaching by professionals was strong enough to justify state regulation of in-person solicitation by lawyers."). In New York, solicitation is also a violation of the Rules of Professional Conduct (whose purpose is also to protect clients from professional overreach), 22 NYCRR § 1200, Rule 7.3; solicitation of personal-injury clients also violates Rule 4.5(a) if it occurs before the 30th day after the incident.

interests. *See Strougo & Blum Esqs. v. Zalman & Schnurman, Esqs.*, No. 603665/09, 2010 WL 1459009 (Sup. Ct. N.Y. County Apr. 5, 2010) (sustaining tortious-interference claim alleging defendant law firm fraudulently induced plaintiff's client to sign a release, resulting in the dismissal of a lawsuit in which the plaintiff represented the client); *see also Don Buchwald & Assocs., Inc. v. Rich*, 281 A.D.2d 329, 330 (2001) (finding that "defendants went far beyond mere persuasion" "in "inducing [their former employer's clients] to switch to [their] competing business"). "Wrongful means" may consist of (1) an independent crime or tort; (2) conduct committed solely out of malice; or (3) conduct amounting to "extreme and unfair" economic pressure. *Splash, LLC v. Shullman Family L.P.*, 56 Misc. 3d 556, 564 (Sup. Ct. Westchester County 2017) (quoting *Friedman v. Coldwater Creek, Inc.*, 551 F. Supp. 2d 164, 170 (S.D.N.Y. 2008)); *see Carvel Corp.*, 3 N.Y.3d at 189-190 (quoting *NBT Bancorp, Inc. v. Fleet/Norstar Fin. Group, Inc.*, 215 A.D.2d 990, 990 (3d Dep't 1995), *aff'd* 87 N.Y.2d 614 (1996)) (wrongful means for tortious interference typically must be criminal or independently tortious, but may include conduct undertaken "for the sole purpose of inflicting intentional harm on plaintiffs"); *id.* at 196-97 (may also include "economic pressure" that is so "extreme and unfair" as to be "wrongful").

Violation of either or both of the foregoing statutory prohibitions against solicitation, by having "case runners" appear at doctors' offices to lie to patients about their current attorneys and offer cash payments in exchange for "signing up" one's firm as substitute counsel, would constitute "**wrongful means**," i.e., conduct that is "criminal or independently tortious" in nature. *Carvel Corp.*, 3 N.Y.2d at 190. A violation of section 487 of the Judiciary law, in the form of a "chronic and extreme pattern of legal delinquency" that undermines the integrity of the judicial system, would constitute "**wrongful means.**" (*See infra* § II.) Defamation, i.e., falsely accusing

Ginarte of the crime of grand larceny (*see infra* § III) in order to harm its business and gain an advantage, would constitute "**wrongful means.**" Usurping and exploiting Ginarte's substantial investment in its own business (*see infra* §§ IV, V), for one's own gain, would constitute "**wrongful means.**" Engaging in organized crime, committing multiple federal offenses as part of a racketeering enterprise, would constitute "**wrongful means.**" (*See infra* § VI.) Failing to advise the clients of their unlawful conduct in obtaining their representation in violation of Rule 1.4(b) of the New York Rules of Professional Conduct, which requires a lawyer to explain all things necessary "to permit the client to make informed discussions regarding the representation", is **wrongful means**. Filing false statements with the Office of Court Administration ("OCA"), including falsely responding to Question 7 of the OCA retainer statement which requires an attorney to name the person who referred the client, would constitute a felony and separately also constitute "**wrongful means.**" *See In re Sessler*, 20 A.D.3d 23, 24 (1st Dep't 2005); *Matter of Dicker*, 18 A.D.3d 90, 91 (1st Dep't 2005). The Defendants have engaged in all of the foregoing conduct.

The Schwitzer Defendants further complain about the lack of "particularity" in the pleading, without providing any authority that a claim for tortious interference with contract is subject to the heightened pleading standard of CPLR 3016. (*See* Br. at 8-10.) Moreover, the cases cited by the Schwitzer Defendants are simply inapposite. *Alvord and Swift v. Muller Constr. Co.*, 46 N.Y.2d 276 (1978), dismissed a tortious interference claim on summary judgment for lack of evidence substantiating the plaintiff's allegations, not on a motion to dismiss for failure to state a claim, let alone for lack of "particularity" in the pleading. *See id.* at 281-82.[13] In *M.J. & K. Co. v. Matthew Bender & Co.*, 220 A.D.2d 488 (2d Dep't 1995) the

[13] The *Strougo & Blum* case cited above provides a trenchant example of the difference between whether a *pleading*
(Footnote continued on next page)

claim was dismissed because the plaintiffs therein "offered ... no factual basis to support [their] allegations," *id.* at 490, which the Plaintiff herein has done, not only in the Complaint but in its supplemental submissions which, *inter alia*, identify at least four (4) Ginarte clients that the Defendants successfully stole, and five (5) more that they attempted to steal, with detailed descriptions of how they did it. *Cf. Burrowes v. Combs*, 25 A.D.3d 370, 373 (1st Dep't 2006) (plaintiff "failed to [even] allege that but for defendants' actions [the counterparty] would have continued her contract with plaintiff"); *Chemical Bank v. Ettinger*, 196 A.D.2d 711, 716 (1st Dep't 1993) (dismissing tortious-interference counterclaim, alleging bank improperly used defendant's funds and failed to disclose its "favoritism" toward another party, for lack of any "specific reference ... to [a] particular contract").[14] Ginarte's supplemental submissions herewith include the particular contracts (i.e., retainer agreements) of which the Defendants intentionally procured the breach (Robert Aff., Ex. 3), and the inference is clear and unmistakable that the clients who left Ginarte for Schwitzer Firm and/or Garcia Firm would have remained with Ginarte but for the unlawful conduct of the Defendants and their "case runners" including the Runner Defendants.

In any event, the Schwitzer Defendants' Motion fails to establish that Plaintiff's allegations (with or without the supplemental submissions) lack the requisite particularity in any event. Although the allegations in the Complaint by themselves are adequate to satisfy the notice-pleading standard of CPLR 3013 – which is all that is required for a claim of tortious

(Footnote continued from previous page)
of tortious interference is adequate to survive a motion to dismiss, and whether *evidence* of tortious interference is adequate to survive a motion for summary judgment.

[14] *RKA Film Financing, LLC v. Kavanaugh*, 60 Misc.3d 1223(A) (Table; text at 2018 WL 3973391 (Sup. Ct. N.Y. County Mar. 5, 2018)), cited by the Schwitzer Defendants for the proposition that "The global failure to name a party to whom alleged misrepresentations were made is fatal to the complaint" (*id.* at *4; Br. at 9), addresses claims for fraud and fraudulent inducement, not tortious interference. *See* 2018 WL 3973391, at *3-4. In any event, as stated above, Ginarte will reveal the clients' names if ordered to do so by the Court which will presumably be accompanied by certain protective measures.

interference with contract – the supplemental materials submitted herewith fill any potential void, no matter how small, by identifying *inter alia* the specific clients, dates, places, words spoken, speakers, "case runners" and specific attempts by the Runner Defendants to solicit Ginarte's clients for the Defendants. (*Cf.* Br. at 9-10.)[15] As such, the Court should deny the motion to dismiss this cause of action.

II. THE COMPLAINT AND PLAINTIFF'S SUPPLEMENTAL SUBMISSIONS STATE A CAUSE OF ACTION FOR VIOLATION OF NEW YORK JUDICIARY LAW § 487.

The allegations in the Complaint establish a "chronic and extreme pattern of legal delinquency" on the part of the Defendants that includes, *inter alia*, improper solicitation of Ginarte's clients in violation of the law and legal ethics, and establish that attorneys in the Schwitzer Firm were involved in such activities dating as far back as 2006. The Schwitzer Defendants argue that Ginarte lacks standing to pursue this claim, not having been a party to any case that they stole. This is simply wrong.

Section 487 of New York's Judiciary Law permits "the party injured" by an attorney's "deceit or collusion" to recover "treble damages … in a civil action." The complaint must establish a "pattern of wrongdoing or deceit" (i.e., "legal delinquency") that is "chronic and extreme" in nature. *See, e.g., Kaminsky v. Herrick, Feinstein LLP*, 59 A.D.3d 1, 13 (1st Dep't 2008), *lv. denied* 12 N.Y.3d 715 (2009); *Solow Mgt. Corp. v. Seltzer*, 18 A.D.3d 399, 400 (1st Dep't 2005), *lv. denied* 5 N.Y.3d 712 (2005); *Havell v. Islam*, 292 A.D.2d 210, 210 (1st Dep't 2002). The complaint must also show that the actions of the attorney proximately caused its damages. *Nason v. Fisher*, 36 A.D.3d 486, 487 (1st Dep't 2007); *Jaroslawicz v. Cohen*, 12

[15] Inexplicably, the Schwitzer Defendants complain that the Schwitzer Firm's "case runners" are left "unspecified" in the Complaint (Br. at 9), which names both Ms. Pena and Ms. Gomez as "case runner[s]" in paragraphs 29 and 30, respectively.

A.D.3d 160, 161 (1st Dep't 2004).

The facts set forth in the Complaint and the Plaintiff's supplemental submissions clearly establish a violation of § 487, i.e., a "chronic and extreme" "pattern of wrongdoing [and] deceit" on the part of the Defendants, with the "requisite particularity," that at a minimum violate Rules of Professional Conduct 4.5 and/or 7.3, New York Penal Law § 175.35 (in connection with falsely responding to Question 7 of the OCA retainer statement), and may also violate the Judiciary Law's prohibitions against in-person solicitation, and establish that this conduct was the proximate cause of Ginarte's damages. *See supra* § I.A; *infra* § III. Further, section 487 authorizes a civil action to be brought by "the party injured" to redress an attorney's "deceit or collusion" undertaken "with intent to deceive *the court* or *any* party" (emphasis added). *See Mazel 315 W. 35th LLC v. 315 W. 35th Assoc. LLC*, 120 A.D.3d 1106, 1107 (1st Dep't 2014) (finding allegation of "intentional deceit *of the court* sufficient to support the cause of action" for violation of § 487) (emphasis added); *Kurman v. Schnapp*, 73 A.D.3d 435, 435 (1st Dep't 2010) ("Plaintiff stated a cause of action under Judiciary Law § 487 by alleging that defendant deceived or attempted to deceive *the court*[.]") (emphasis added). The "Defendant[s] contend[] that the section grants a remedy *only* to a *client* who is damaged by his attorney's deceit or collusion. The statute, however, explicitly refers to '*any* party' and awards treble damages 'to the party injured'." *Fields v. Turner*, 1 Misc. 2d 679, 680-81 (Sup. Ct. N.Y. County 1955) (emphasis added).[16]

[16] Moreover, Plaintiff's allegations with respect to this cause of action all relate to "pending judicial proceeding[s]" in which Ginarte's clients who either substituted Ginarte out or submitted an affidavit herein are, or were, parties; and the Schwitzer Defendants present no authority that a party's agent or fiduciary *cannot* sue under § 487. *Accord Albert Jacobs LLP v. Parker*, No. 51203/2014, 2015 WL 13780247, at *2 (Sup. Ct. Westchester County Jun. 17, 2015) (sustaining pleading of § 487 claim brought by decedent's estate, noting that the decedent's death "does not necessarily require the dismissal of the Estate's claims" under the statute).

As the Court of Appeals has made abundantly clear, "section 487 is not a codification of a common-law action for fraud. ... The operative language at issue – 'guilty of any deceit' – focuses on the attorney's intent to deceive, not the deceit's success." *Amalfitano v. Rosenberg*, 12 N.Y.3d 8, 14 (2009). Accordingly, the "appropriate context for analysis is not the law applicable to comparable civil torts but rather criminal law, where an attempt to commit an underlying offense is punishable as well [as] the underlying offense itself." *Id.* (quoting *Amalfitano v. Rosenberg*, 428 F. Supp. 2d 196, 210 (S.D.N.Y. 2006), *aff'd* 572 F.3d 91 (2d Cir. 2009)), "Further, to limit forfeiture under section 487 to *successful* deceits would be contrary to the statute's evident intent to enforce an attorney's special obligation to protect the integrity of the courts and foster their truth-seeking function." *Amalfitano*, 12 N.Y.3d at 14 (emphasis added). Accordingly, fraud on the court or attempted fraud on the court, even if unsuccessful, requires no element of reliance on the part of "the party injured" to constitute a violation of section 487. *See id.* at 12-14; *see also Melcher v. Greenberg Traurig*, 23 N.Y.3d 10, 13-14 (2014) (reiterating Court of Appeals' holding in *Amalfitano*).

In addition, "a separate lawsuit may be brought" for violation of section 487 "where the alleged [misconduct] in the underlying action was 'merely a means to the accomplishment of a larger fraudulent scheme' which was 'greater in scope than the issues determined in the prior proceeding.'" *Specialized Indus. Servs. Corp. v. Carter*, 68 A.D.3d 750, 752 (2d Dep't 2009) (quoting *Newin Corp. v. Hartford Acc. & Indem. Co.*, 37 N.Y.2d 211, 217 (1975) and *Retina Assocs. of Long Island v. Rosberger*, 299 A.D.2d 533, 533 (2d Dep't 2002) (citations and internal quotation marks omitted)). In other words, "the Judiciary Law cause of action [need] not arise out of the factual transaction which was the subject matter of [the underlying] action." *Id.*

The allegations and supplemental submissions, in the aggregate, describe a "chronic and extreme pattern of legal delinquency" consisting of the unlawful solicitation and calculated theft of the Ginarte firm's clients, in high-value cases, through a pattern of collusion, deception, subterfuge, and cash payoffs, and the submission to court of substitution-of-counsel papers derived from and intentionally submitted in furtherance of that scheme. That scheme necessarily includes filing false statements with the Office of Court Administration ("OCA"), including falsely responding to Question 7 of the OCA retainer statement which requires an attorney to name person who referred the client, and false reporting how attorneys' fees were distributed. *See Sessler*, 20 A.D.3d at 24; *Dicker*, 18 A.D.3d at 91. Ginarte is confident that the Schwitzer and Garcia Defendants did not issue IRS Form 1099's to the case runners, and therefore filed false New York State and Federal tax returns.

Although the Ginarte clients, putative clients, and the courts were clearly deceived by their submissions, it is in any event immaterial; the attempt to deceive is actionable in itself. *See Amalfitano*, 12 N.Y.3d at 14. Not only has the Defendants' conduct proximately caused lost business for Ginarte, it has directly and deliberately undermined Ginarte's professional reputation. *See infra* § III. This is the archetypical section 487 case, and the Court should deny the motion to dismiss this cause of action. *See Specialized Industrial Services*, 68 A.D.3d at 751-52; *Buchanan Ingersoll & Rooney, P.C. v. Stieg*, No. 106189/2010, 2010 WL 11033493, at *3 (Sup. Ct. N.Y. County Nov. 9, 2010); *Liberty Mut. Fire Ins. Co. v. Demco New York Corp.*, No. 117722/2009, 2010 WL 10030010, at *9 (Sup. Ct. N.Y. County Sept. 30, 2010).

III. THE COMPLAINT AND PLAINTIFF'S SUPPLEMENTAL SUBMISSIONS STATE A CAUSE OF ACTION FOR DEFAMATION.

The Defendants by and through their employees and/or agents defamed Ginarte by explicitly and unambiguously accusing it of criminal conduct, specifically, telling Ginarte's

clients and potential clients that the firm once stole millions in settlement funds from a client by lying to him about the value of his settlements, and that Ginarte does this as a matter of habit. The Schwitzer Defendants complain again about a purported lack of particularity in the pleadings, but the supplemental submissions more than fill in the blanks, and establish an agency relationship with the Runner Defendants.

"The elements [of defamation] are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation *per se*." *Dillon v. City of N.Y.*, 261 A.D.2d 34, 38 (1st Dep't 1999). The complaint must "state *in haec verba* the particular defamatory words claimed to have been uttered by defendants," *Gardner v. Alexander Rent-a-Car, Inc.*, 28 A.D.2d 667, 667 (1st Dep't 1967), and "also must allege the time, place and manner of the false statement and specify to whom it was made." *Dillon*, 261 A.D.2d at 38; *see* CPLR 3016(a). In addition, the pleading must demonstrate that the defendant's publication of the false statement caused the plaintiff to suffer special damages, i.e., "the loss of something having economic or pecuniary value." *Liberman v. Gelstein*, 80 N.Y.2d 429, 434-35 (1992) (quoting Restat. (2d) Torts § 575, comment b). A cause of action for defamation *per se* requires no special damages provided it "consist[s] of statements (i) charging plaintiff with a serious crime; (ii) that tend to injure another in his or her trade, business or profession; (iii) that plaintiff has a loathsome disease; or (iv) imputing unchastity to a woman." *Liberman*, 80 N.Y.2d at 435. The facts set forth herein, including the pleadings and supplemental submissions, clearly satisfy the elements of defamation.

Unlike tortious interference with contract (*see supra* § I), a cause of action sounding in defamation (namely, "libel or slander") must be stated with particularity, although CPLR 3016(a)

requires only that the "particular *words* complained of" be specified; "their application to the plaintiff may be stated generally." Nevertheless, as with the tortious-interference claim (*see supra* § I.B), to the extent the Complaint does not state the precise words spoken (which it actually does; *see* ¶¶ 35(c)(ii), (c)(v); 55(b), (e)), the Plaintiff's supplemental submissions – particularly the telephone recording transcription – more than fills in the blanks of which the Schwitzer Defendants complain in their motion to dismiss.

Three Ginarte clients have submitted affidavits detailing the Defendants' defamatory statements:

- In August 2018, a woman matching the description of defendant Mignolia Pena but identifying herself as "Carmen" told Client 1 that Ginarte are thieves, because they settle a client's case for ten to twenty million dollars and falsely tell the client that it settled for a lot less, thus "stealing" the remainder of the settlement money. (Robert Aff. Ex. 7, Client 1 Aff. ¶ 7.) She also told Client 1 that Ginarte is a big firm that doesn't care about its clients. (*Id.* ¶ 8.)

- During the week of October 22, 2018, a woman matching Mignolia's description told Client 3 that Ginarte were "thieves," who settle cases for ten to twenty million dollars and falsely tell the clients that they settled for a lot less, so they could steal most of the settlement money. (Robert Aff. Ex. 17, Client 3 Aff. ¶ 7.) She also said that because Ginarte is such a big firm, it does not care about its clients. (*Id.* ¶¶ 8-9.)

- During the week of October 22, 2018, a woman matching Mignolia's description told Client 4 that Ginarte were "thieves," who settle cases for ten to twenty million dollars and falsely tell the clients that they settled for a lot less, so they could steal most of the settlement money. (Robert Aff. Ex. 19, Client 4 Aff. ¶ 7.) She also said that because Ginarte is such a big firm, it does not care about its clients. (*Id.* ¶¶ 8-9.)

The affidavit of Ginarte employee Juan Flores Hernandez, and the recording transcripts, provide even more granular detail. Defendant Mignolia Pena, on October 22, 2018, at or around 7:03 p.m., over the telephone, on behalf of the Defendants, told Juan Hernandez, an employee of Ginarte whom Mignolia thought was a client or potential client, that Ginarte is "the biggest thief" and accusing Ginarte of stealing settlement funds by lying to clients about the value of their

settlements; i.e., telling the client that a settlement of $15-20 million or more was only $1.3 million, and keeping the difference. "[Y]ou don't know how many millions [the defendants] are giving [the clients], and [Ginarte] is keeping that money," indeed keeping "all Hispanic people's money." She said, "The lawyer is like a doctor. There are doctors that cure you, and there are doctors that kill you ... There are good attorneys" like the Defendants, "and then there are [the] lawyers that ... robbed my son," i.e., Ginarte. She therefore explicitly accused Ginarte of having actually committed the crime of larceny[17] – which is neither an "expression[] of opinion" nor a "loose, figurative or hyperbolic statement[.]" *Wolberg v. IAI N. Am., Inc.*, 161 A.D.3d 468, 470 (1st Dep't 2018) (quoting *Dillon*, 261 A.D.2d at 38).

These facts by themselves are more than sufficient to sustain the pleading of a cause of action for defamation, giving Plaintiff the benefit of every favorable inference – including the inference, given the striking similarity between all of the affiants' reported encounters with the Runner Defendants, and the fact that the Runner Defendants took or directed Mr. Flores and Client 2 to the office address and suite where both the Schwitzer and Garcia Firms reside, offered transportation to that vicinity to Client 1 and told Mr. Alvarado that the firm for which her daughter worked was in that vicinity, that these and/or similar statements were also made on the Schwitzer and/or Garcia Defendants' behalf to the substituted clients. *See Dillon*, 261 A.D.2d at 38 (pleading for defamation must set forth "a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard"); *see also Liberman*, 80 N.Y.2d at 435 (defamation *per se* requires no special damages

[17] *See generally* N.Y. Penal L. Art. 155 – New York's grand larceny statute. The clear and deliberate implication that Ginarte "stole" anywhere from $13.7 to $18.7 million from Ms. Pena's son by falsely telling him or her that his or her case had settled for a paltry $1.3 million when it had actually settled for $15-20 million and keeping, i.e. "stealing," the difference, accuses Ginarte of grand larceny in the first degree – a class B felony. N.Y. Penal L. § 155.42.

where it "consist[s] of statements" that, *inter alia*, "charg[e] plaintiff with a serious crime" or "tend to injure [the plaintiff] in his or her trade, business or profession").

An agency relationship is established by the "'consent of one person to allow another to act on his or her behalf and subject to his or her control, and consent by the other to so act,' even where the agent is acting as a volunteer." *Art Fin. Partners, LLC v. Christie's Inc.*, 58 A.D.3d 469, 471 (1st Dep't 2009) (quoting *Fils-Aime v. Ryder TRS, Inc.*, 40 A.D.3d 917, 918 (2d Dep't 2007) and citing Restat. (2d) Agency § 225); *see Maurillo v. Park Slope U-Haul*, 194 A.D.2d 142, 146 (2d Dep't 1993) ("The agent is a party who acts on behalf of the principal with the latter's express, implied, or apparent authority."). Moreover, it is axiomatic that "the doctrine of *respondeat superior* renders a master vicariously liable for a tort committed by its servant acting within the scope of his employment[.]" *Riviello v. Waldron*, 47 N.Y.2d 297, 302 (1979); *see Fils-Aime*, 40 A.D.3d at 917-18 ("Under the doctrine of respondeat superior, a *principal* is liable for the negligent acts committed by its *agent* within the scope of the *agency*.") (emphasis added). "An employee's actions fall within the scope of employment where the purpose in performing such actions is to further the employer's interest, or to carry out duties incumbent upon the employee in furthering the employer's business." *Danner-Cantalino v. City of N.Y.*, 85 A.D.3d 709, 710 (2d Dep't 2011); *see Judith M. v. Sisters of Charity Hosp.*, 93 N.Y.2d 932, 933 (1999) ("[T]he employer may be liable when the employee acts negligently or intentionally, so long as the tortious conduct is generally foreseeable and a natural incident of the employment."). "The question of whether a particular act was within the scope of employment is ordinarily one for the jury because it is so heavily dependent on factual considerations." *Petrescu v. College Racquet Club, Inc.*, 40 A.D.3d 947, 949 (2d Dep't 2007); *see Riviello*, 47 N.Y.2d at 303.

"[A]n employer [is not] necessarily excused" from vicarious liability for its agents' acts "merely because his employees, *acting in furtherance of his interests*, exhibit human failings and perform negligently or otherwise than in an authorized manner. Instead, the test [is] whether the act was done while the servant was doing his master's work, no matter how irregularly, or with what disregard of instructions." *Riviello*, 47 N.Y.2d at 302 (emphasis added, citations and internal quotation marks omitted). Thus, "for an employee to be regarded as acting within the scope of his employment, the employer need not have foreseen the precise act or the exact manner of the injury as long as the general type of conduct may have been reasonably expected. [I]t suffices that the tortious conduct be a natural incident of the employment. ... [W]here the element of *general* [as opposed to specific] foreseeability exists, even intentional tort situations have been found to fall within the scope of employment." *Id.* at 304 (citations omitted).

The doctrine of *respondeat superior* therefore clearly applies to the tort of defamation, i.e., defamatory statements made by employees on behalf of their employers, and/or by agents on behalf of their principals where the former were working for the latter even without formal employment. *See LeBlanc v. Skinner*, 103 A.D.3d 202, 210-11 (2d Dep't 2012) (sustaining claim for defamation against principals for statements made and published by agent); *accord Loughry v. Lincoln First Bank, N.A.*, 67 N.Y.2d 369, 373 (1986) ("[A]n employer may be liable for compensatory damages caused by false statements maliciously published by its employees in the course of employment[.]"). The Second Department in *LeBlanc* found that "the plaintiff [therein] adduced sufficient facts which clearly raise a triable issue as to whether" a blogger who posted defamatory statements about the plaintiff online "was acting as an agent on behalf of" two named defendants, a former Town Supervisor and his wife. *Id.* at 211. Further, "a defense that [the blogger]'s alleged conduct in posting the subject statements exceeded the scope of his

alleged agency relationship with the [named] defendants does not go to the merits of the plaintiff's defamation claims. Instead, it is a defense which puts the jural relationship itself at issue, and the law defers its determination to the trial[.]" *Id.* at 211 (citations and internal quotation marks omitted)

The Plaintiff herein alleges, and through its supplemental submissions has demonstrated, that the Runner Defendants were either employed by the Schwitzer and/or Garcia Defendants, associated therewith, and/or acting as their agents, within the scope of that employment, association and/or agency, on behalf of and by authority of the Schwitzer and/or Garcia Defendants, in soliciting Ginarte's clients in the manner described. As set forth above, the statements that Mignolia made on Schwitzer's and/or Garcia's behalf in her telephone conversation with Juan Flores Hernandez at 7:03 p.m. on October 22, 2018 amounted not to "opinion" or "hyperbole" as the Schwitzer Defendants assert, but to an explicit and unambiguous accusation of criminal conduct, specifically the crime of grand larceny, not only as a matter of habit and practice but with reference to a specific incident and victim, her "son" whom she claimed Ginarte "robbed" in the foregoing fashion.

It is clear from "the content of the communication as a whole, as well as its tone and apparent purpose" and "the over-all context in which the assertions were made" that her intent was for the listener to "have believed that [these] statements were conveying *facts* about" Ginarte (*Mann v. Abel*, 10 N.Y.3d 271, 276 (2008) (emphasis added; internal quotation marks omitted)), specifically, that Ginarte had actually "robbed" her "son" of untold "millions" and thus was guilty of grand larceny in the first degree, a class B felony. *See* N.Y. Penal L. § 155.42. The Schwitzer Defendants' assertion that "it is unlikely a reasonable listener would have inferred" from Mignolia's words "that Ginarte actually steals from its clients" (Br. at 15) is preposterous,

and grotesque.

The Court should deny the motion to dismiss this cause of action.

IV. THE COMPLAINT AND PLAINTIFF'S SUPPLEMENTAL SUBMISSIONS STATE A CAUSE OF ACTION FOR UNFAIR COMPETITION.

The Defendants misappropriated the labors, skills and expenditures of Ginarte by wrongfully soliciting its clients, taking unfair advantage of the significant work Ginarte had already done and costs it had already expended on the respective cases. The Schwitzer Defendants would have this court find that "competition" between attorneys can *never* be deemed "unfair" even when improper and illegal tactics are employed to steal clients through collusion and deceit. The Defendants have unfairly and wrongfully usurped and exploited for their own gain not any property interest in the clients themselves, but Ginarte's significant investment in its own business.

"New York's common law unfair competition doctrine is both broad and flexible, encompassing an incalculable variety of illegal practices or commercial immorality." *Ivy League Sch., Inc. v. Danick Indus., Inc.*, 44 Misc. 3d 1223(A) (Table; text at 2014 WL 4099376, at *8 (Sup. Ct. Suffolk County Aug. 20, 2014)) (citation, internal quotation marks omitted). A cause of action alleging unfair competition under the common law in New York "must show that the defendants misappropriated the plaintiffs' labors, skills, expenditures, or good will and displayed some element of bad faith in doing so." *Abe's Rooms, Inc. v. Space Hunters, Inc.*, 38 A.D.3d 690, 692 (2d Dep't 2007). "The principle that one may not misappropriate the *results* of the skill, expenditures and labors of a competitor has … often been implemented in [New York] courts" as well. *Electrolux Corp. v. Val-Worth, Inc.*, 6 N.Y.2d 556, 567 (1959) (emphasis added); *see ITC Ltd. v. Punchgini, Inc.*, 9 N.Y.3d 467, 477 (2007).

By stealing and attempting to steal Ginarte's clients, after Ginarte expended substantial monies in advertising to attract the clients, performed the legwork and laid out expenditures in performing client intake evaluations, initiated the lawsuits, conducted extensive fact investigations, etc., the Defendants have misappropriated Ginarte's and its staff's labors, skills and expenditures for their own benefit. Further, by having the Runner Defendants make false and defamatory statements to those clients about Ginarte "stealing" the balance of settlements from clients, referring to Ginarte as "super thief" and unambiguously, baselessly accuse Ginarte of first-degree grand larceny, a class B felony, and by possibly violating sections 479 and/or 482 of the Judiciary Law in the process, the Defendants and their agents have more than "displayed some element of bad faith in doing so." *Abe's Rooms*, 38 A.D.3d at 692.

Plaintiff does not contend, as the Schwitzer Defendants wish to imply, that Ginarte's clients are themselves Ginarte's property. Indeed, the Schwitzer Defendants' citation of *Miller v. Walters*, 46 Misc. 3d 417, 427 (Sup. Ct. N.Y. County 2014) for this proposition is completely misleading and inapposite. The plaintiffs in *Miller*, a sports management firm and its founder, alleged *inter alia* unfair competition against the defendants, competitor sports management agencies and their presidents, over the purported "theft" of the plaintiffs' client, NBA player Larry Sanders. *Id.* at 418-19. In dismissing the claim, the court noted that "plaintiffs' claim" in *Miller* "distill[ed] down to a claim of ownership, at least in part, of Sanders' *accomplishments* in his second and third seasons in the NBA," from which the defendants had "benefit[ed] financially[.]" *Id.* (emphasis added).

Ginarte herein does not "claim an ownership interest in its clients" as persons (Br. at 17), nor in the clients' own personal "accomplishments" post-substitution. Rather, Ginarte claims an ownership interest in <u>its own substantial investment</u> in the pursuit of those clients' legal claims,

which investment the Defendants have wrongfully usurped and exploited for their own benefit.[18] *See LaMantia v. Durst*, 561 A.2d 275 (N.J. App. Div. 1989). It is clear that in targeting Ginarte's high-value personal-injury cases, the Defendants necessarily used all of the information compiled by Ginarte in assessing the viability of those cases. Any financial gain derived by the Defendants from the stolen clients' cases would constitute the misappropriation of "the *results* of the skill, expenditures and labors of a competitor," namely Ginarte, which New York Courts also proscribe. *Electrolux*, 6 N.Y.2d at 567; *accord ITC Ltd.*, 9 N.Y.3d at 477.

Again, the Schwitzer Defendants would have this Court believe that attorneys and law firms can steal each other's clients by whatever means they wish, with absolute immunity from any and all legal consequence, and that "competition" between law firms for clients and their cases could <u>never</u> be "unfair" – even when those firms are engaged in unfair, tortious and criminal activity. The Schwitzer Defendants are simply wrong and the Court should deny the motion to dismiss this cause of action.

V. THE COMPLAINT AND PLAINTIFF'S SUPPLEMENTAL SUBMISSIONS STATE A CAUSE OF ACTION FOR UNJUST ENRICHMENT.

One cannot plausibly dispute that it would be against the principles of equity and good conscience for the Defendants to keep the financial benefits of their unlawful scheme, gained at Ginarte's expense through collusion and deceit. Moreover, the Complaint and the supplemental submissions sufficiently establish a connection between the parties that "*could have* caused reliance or inducement," and was therefore "not to attenuated" to support a cause of action for unjust enrichment.

[18] Plaintiff does not allege that the Schwitzer Defendants misappropriated Ginarte's good will. However, such an allegation is not necessary to sustain the pleading. *See Abe's Rooms*, 38 A.D.3d at 692 (cause of action for unfair competition requires the plaintiff to show "that the defendants misappropriated the plaintiffs' labors, skills, expenditures <u>or</u> good will") (emphasis added).

"An action for unjust enrichment is based upon an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned. Where the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded." *ProHealth Care Assocs., LLP*, No. 022245/10, 2011 WL 2604429, at *3 (Sup. Ct. Nassau County Jun. 20, 2011) (citing *IDT Corp. v. Morgan Stanley*, 12 N.Y.3d 132, 142 (2009)) (emphasis added). "The essential inquiry in any action for unjust enrichment is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. Such a claim is undoubtedly equitable and depends upon broad considerations of equity and justice. Generally, courts will determine whether 1) a benefit has been conferred on defendant under mistake of fact or law; 2) the benefit still remains with the defendant; and 3) the defendant's conduct was tortious or fraudulent." *Am. Express Bank, FSB v. Yin Kat Yong*, No. 14810-11, 2012 WL 1379433 (Sup. Ct. Nassau County Apr. 9, 2012) (citing *Paramount Film Distributing Corp. v. N.Y.*, 30 N.Y.2d 415, 421 (1972)).

Given the allegations in this case and the Plaintiff's supplemental submissions, it is beyond doubt that it would be against equity and good conscience to allow the Defendants to retain the benefits of their blatant ambulance-chasing scheme to steal Ginarte's clients through ambush, deception and cash payoffs, especially if that conduct constitutes improper solicitation in violation of section 479 and/or 482 of the Judiciary Law. They have been unjustly enriched at Ginarte's expense, and should be held to account.

The Complaint and the supplemental submissions also sufficiently "indicate a relationship between the parties that *could have* caused reliance or inducement." *Philips Int'l Investments, LLC v. Pektor*, 117 A.D.3d 1, 7 (1st Dep't 2014) (emphasis added); *see also*

Quadriad Realty Partners, LLC v. Wilbee Corp., No. 153621/2018, 2018 WL 6718664, at *6 (Sup. Ct. N.Y. County Dec. 20, 2018) (sustaining unjust enrichment claim noting that "privity is not necessary ... merely allegations of a relationship that is *not too attenuated*") (emphasis added). At a minimum, by sending Ginarte substitution letters on its cases the Defendants – Ginarte's direct competitors – undoubtedly established a connection with Ginarte that is "not too attenuated," causing Ginarte to rely upon the legitimacy of those substitutions. *Accord Davoli v. Dourdas*, No., 654362/2013, 2015 WL 1806073, at *10 (Sup. Ct. N.Y. County Apr. 20, 2015) (sustaining unjust enrichment claim alleging relationship between plaintiff and co-defendant which "is sufficient insofar as plaintiff specifically asserts that she was induced to trust [another co-defendant] by virtue of it").

The Court should deny the motion to dismiss this cause of action.

VI. THE COMPLAINT AND PLAINTIFF'S SUPPLEMENTAL SUBMISSIONS STATE A CAUSE OF ACTION UNDER THE FEDERAL CIVIL RICO PROVISIONS.

The Complaint and supplemental submissions clearly establish a scheme, involving the use of the U.S. mail and interstate wires, to obtain a business advantage by means of false or fraudulent pretenses, representations or promises – hence, a racketeering enterprise. The Schwitzer Defendants complain that Ginarte lacks standing to pursue a RICO claim, but the U.S. Supreme Court has made clear that the victim of a RICO violation predicated on mail or wire fraud need not show that it was actually defrauded by the Defendant.

New York state courts have concurrent jurisdiction over federal civil RICO claims. *Simpson Elec. Corp. v. Leucadia, Inc.*, 72 N.Y.2d 450, 455 (1988). The federal RICO Act "makes it unlawful to use income from a 'pattern of racketeering activity' (1) to acquire an interest in or to establish or operate an enterprise engaged in or affecting interstate commerce, (2) to acquire or maintain an interest in such an enterprise through a pattern of racketeering activity,

(3) to conduct or participate in the conducting of such an enterprise through a pattern of racketeering activity, and (4) to conspire to do any of the foregoing acts." *Id.* at 453 (citing 18 U.S.C. §§ 1962(a), (b), (c) and (d)). "'Acts of racketeering' are defined as a variety of acts chargeable under State law and indictable under Federal law." *Id.* at 461 (citing 18 U.S.C. § 1961(1)). "To state a cause of action for damages based on a civil RICO violation, a plaintiff must plead (1) the defendant's violation of 18 USC § 1962 et seq., (2) an injury to the plaintiff's business or property, and (3) that the defendant's violation of the statute caused the plaintiff's injury." *Dempster v. Liotti*, 86 A.D.3d 169, 177-78 (2d Dep't 2011).

As with Plaintiff's other claims, the supplemental submissions fill in the blanks of which the Schwitzer Defendants complain with respect to the particularity of the allegations and details of the predicate acts of mail and wire fraud, specifically, using the mail to send substitution-of-counsel papers to clients, to Ginarte (who has offices in New York and New Jersey), and to the courts, and using the interstate wires to pay for Uber services,[19] in furtherance of a scheme to obtain a business advantage "by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1343; *see* 18 U.S.C. § 1341; *Pereira v. U.S.*, 347 U.S. 1, 8 (1954) ("The elements of the offense of mail fraud ... are (1) a scheme to defraud, and (2) the mailing of a letter, etc., for the purpose of executing the scheme."); *see also U.S. v. Frey*, 42 F.3d 795, 797 (3d Cir. 1994) (wire fraud is identical to mail fraud except that it contemplates communications transmitted by wire).

It is clear that the Defendants are guilty of multiple federal (and state) offenses, and are, therefore, engaged in a racketeering enterprise that dates as far back as 2006, when attorneys employed by the Schwitzer Law Firm's predecessor firm were bribing hospital employees for

[19] Uber's corporate headquarters (Uber Technologies, Inc.) are located in San Francisco, CA. *See generally* https://www.uber.com/newsroom/company-info/

referrals in violation of New York law, and as law firms use the mail and wires every day, had to have been using the mail and/or wires as part of that criminal enterprise. *See U.S. v. Handakas*, 286 F.3d 92, 100 (2d Cir. 2002), *overruled on other grounds in U.S. v. Rybicki*, 354 F.3d 124 (2d Cir. 2003) ("The [mailing] element is satisfied if the mail is used *or if its use is reasonably foreseeable*.") (emphasis added); *see also U.S. v. Altman*, 48 F.3d 96, 102 (2d Cir. 1995) (quoting *Pereira*, 347 U.S. at 8) ("The scheme to defraud need not contemplate the use of the mails as an essential part of the scheme as long as the mailing is '*incident* to an essential part of the scheme.'") (emphasis in original).

Moreover, contrary to the Schwitzer Defendants' assertion, Plaintiff need not show that any discrete predicate offenses were directed at Ginarte, or that Ginarte was the actual victim thereof; only that Ginarte "incurred a clear and definite injury to his business or property by reason of the defendants' *RICO violation*." *Watkins v. Smith*, No. 12 Civ. 4635(DLC), 2012 WL 5868395, at *6 (S.D.N.Y. Nov. 19, 2012) (emphasis added). This is, indeed, the very essence and purpose of the RICO statute, and the civil remedy arising thereunder pursuant to 18 U.S.C. § 1964(c) for "*any* person injured in his business or property by reason of a *violation of section 1962* of this chapter." (emphasis added). The Supreme Court of the United States has explicitly held that "a plaintiff asserting a [civil] RICO claim predicated on mail fraud need not show, either as an element of its claim or as a prerequisite to establishing proximate causation, that it relied on the defendant's alleged misrepresentations." *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639, 661 (2008).[20]

[20] *Accord U.S. v. Pierce*, 224 F.3d 158, 166 (2d Cir. 2000) ("[T]o establish a scheme to defraud for the purposes of the wire fraud statute the prosecution need not show that the scheme in fact resulted or would have resulted in a loss *to the person who is the target of the plan*.") (emphasis added); *U.S. v. Trapilo*, 130 F.3d 547, 552 (2d Cir. 1997) (quoting *U.S. v. Helmsley*, 941 F.2d 71, 94 (2d Cir. 1991)) (mail and wire fraud statutes "punish[] the *scheme*, not its success") (emphasis in original).

Simply put, if Ginarte is "injured in [its] business or property" as a direct result of the Defendants having violated § 1962 by committing § 1961 predicate offenses, specifically, using the mail and/or wires as part of a scheme to defraud *someone else* (including, e.g., the courts; *see supra* § II), then Ginarte has a proper cause of action under § 1964(c). The cases cited by the the Schwitzer Defendants do not require a RICO plaintiff to be the victim of *both* the RICO violation *and* the predicate offense itself in isolation. *See Watkins*, 2012 WL 5868395, at *6; *see also Hemi Group LLC v. City of New York, N.Y.*, 559 U.S. 1, 9 (2010) ("Proximate cause for [civil] RICO purposes" merely requires "*some* direct link between the injury asserted and the injurious conduct alleged.") (emphasis added). In addition, *Goldfine v. Sichenzia*, 118 F. Supp. 2d 392 (S.D.N.Y. 2002), noted that common-law breach of contract is not a RICO predicate – nor, for that matter, is common-law fraud, which is in any event distinct from RICO fraud. *See id.* at 405. The Schwitzer Defendants' argument about "third party fraud" under the common law of New York (Br. at 22) is, therefore, inapposite. The Court should deny the motion to dismiss this cause of action.

VII. THE COMPLAINT AND PLAINTIFF'S SUPPLEMENTAL SUBMISSIONS PROPERLY ALLEGE A CIVIL CONSPIRACY AMONGST ALL OF THE DEFENDANTS, WHOSE TORTIOUS ACTS FLOW FROM A COMMON SCHEME OR PLAN AND CONNECT EACH DEFENDANT TO AN ACTIONABLE INJURY.

The Schwitzer Defendants argue that there is no such thing as civil conspiracy in New York, but ignore the legal authority that permits a plaintiff to plead the *existence* of a conspiracy in order to link the actions of separate defendants to a common scheme. The Complaint and supplemental submissions more than adequately do that.

"Although an independent cause of action for civil conspiracy is not recognized in this State, a plaintiff may plead the *existence* of a conspiracy in order to *connect* the actions of the individual defendants with an actionable, underlying tort and establish that those actions were

part of a *common scheme*." *Litras v. Litras*, 254 A.D.2d 395, 396 (2d Dep't 1998) (emphasis added); *see Alexander & Alexander of New York, Inc. v. Fritzen*, 68 N.Y.2d 968, 969 (1986) ("Allegations of conspiracy are permitted ... to connect the actions of separate defendants with an otherwise actionable tort.") (emphasis added); *DeWell Container Shipping Corp. v. Guo*, No. 129552011, 2015 WL 10522395, at *6 (Sup. Ct. Nassau County Sept. 9, 2015).

In other words, "conspiracy" is not an independent tort *per se*; it is, however, a permissible pleading vehicle for connecting multiple defendants – e.g., the Schwitzer Defendants, the Garcia Defendants, and the Runner Defendants – to a single tort claim where the plaintiff cannot currently ascertain which of the defendants is the primary tortfeasor, or where an actionable injury cannot necessarily be attributed on one person but *can* be attributed to several people working in concert. "Under New York law, in order to properly plead a cause of action to recover damages for civil conspiracy, the plaintiff must allege a cognizable tort, coupled with an agreement between the conspirators regarding the tort, and an overt action in furtherance of the agreement." *Faulkner v. City of Yonkers*, 105 A.D.3d 899, 900 (2d Dep't 2013) (citations, internal quotation marks and alterations omitted); *see DeWell*, 2015 WL 10522395, at *7.

The Complaint and the Plaintiff's supplemental submissions more than satisfy the foregoing standard. They establish at least three cognizable torts (and multiple crimes), an agreement and scheme amongst <u>all</u> of the Defendants, acting in concert, to engage in conduct that harmed Ginarte, and numerous "overt action[s] in furtherance of the agreement," as evidenced by the affidavits, recording transcripts, written statements and telephone records. That these materials establish a conspiracy engaged in by all of the Defendants, i.e., that there was an agreement to commit these acts among the Schwitzer and Garcia firms and attorneys as well as their paralegals and "case runners," is more than just a "favorable" inference (*Arrington*, 55

N.Y.2d at 442); it is a *strong, clear* and *unmistakable* inference. The Court should deny the motion to dismiss this cause of action.

VIII. THE COURT SHOULD DENY THE MOTION TO DISMISS PLAINTIFF'S CAUSE OF ACTION FOR A PERMANENT INJUNCTION AS PREMATURE.

Permanent injunctive relief is dependent on the merits of the substantive claims asserted herein; given the foregoing, dismissal at this stage would be premature. The Schwitzer Defendants move to dismiss this cause of action on the ground that none of the other causes of action are viable, but as Plaintiff's supplemental submissions have clearly and indisputably shown, that is not the case. And only a permanent injunction can ensure that the Defendants' misconduct does not continue or resume after this case is decided.

"Although it is permissible to plead a cause of action for a permanent injunction, permanent injunctive relief is, at its core, a remedy that is dependent on the merits of the substantive claims asserted." *Weinreb v. 37 Apts. Corp.*, 97 A.D.3d 54, 59 (1st Dep't 2012) (quoting *Corsello v. Verizon, Inc.*, 77 A.D.3d 344, 368 (2d Dep't 2010), *mod. on other grounds* 18 N.Y.3d 777 (2012), *rearg. denied* 19 N.Y.3d 937 (2012)). Accordingly, and given the foregoing (*supra* §§ I-VII), a dismissal of this cause of action would at this stage be premature. *See Corsello*, 77 A.D.3d at 368 (upholding Supreme Court's denial of motion to dismiss cause of action for permanent injunction as premature, as the claim "is subsumed in other causes of action"); *Red Apple Child Dev. Ctr. v. Bd. of Mgrs. of Honto 88 Condominiums*, No. 160185/14, 2015 WL 4400208, at *7 (Sup. Ct. N.Y. County Jul. 17, 2015) (cause of action for permanent injunction "sufficiently state[d]" where its elements and those of another cause of action on which it is based, are adequately pled); *Anninos v. Kondilys*, No. 17439/2011, 2011 WL 11085348, at *3 (Sup. Ct. Queens County Oct. 5, 2011) (cause of action for permanent injunction "is adequately supported by [other] claims which are sufficiently stated").

Nevertheless, the Complaint and the supplemental submissions adequately plead a cause of action for permanent injunction, setting forth "a violation of a right presently occurring, or threatened and imminent, that [Ginarte] has no adequate remedy at law, that serious and irreparable harm will result absent the injunction, and that the equities are balanced in [Ginarte's] favor." *Caruso v. Bumgarner*, 120 A.D.3d 1174, 1175 (2d Dep't 2014); *see Elow v. Svenningsen*, 58 A.D.3d 674, 675 (2d Dep't 2009). The Defendants have been and are wrongfully soliciting and stealing Ginarte's clients using improper, unethical, deceptive and unlawful tactics, including having the Runner Defendants ambush those clients at a medical office, misleading those clients by *inter alia* falsely accusing Ginarte of grand larceny, offering cash payments and loan forgiveness in exchange for "signing up" cases – conduct that might constitute a misdemeanor in violation of the Judiciary Law and that, once proven, should not be allowed to continue. The Court should deny the motion to dismiss this cause of action.

IX. THE SCHWITZER DEFENDANTS' COUNTERCLAIM SOUNDING IN DEFAMATION IS BARRED BY THE COMMON-LAW LITIGATION PRIVILEGE AND/OR THE STATUTORY FAIR-REPORTING PRIVILEGE.

The Schwitzer Defendants' counterclaim is grounded in the frivolous assertion that this case is a "sham" and that Ginarte just invented all of these allegations for the sole purpose of defaming its competitors. The Plaintiff's supplemental submissions clearly show that this is not the case.

Under the common law of New York, statements made by parties and their counsel in the course of a judicial proceeding are protected by an absolute privilege, which "affords a speaker or writer immunity from liability for an otherwise defamatory statement ... *regardless of the motive* with which the statement was made." *Sexter & Warmflash, P.C. v. Margrabe*, 38 A.D.3d

163, 170 (1st Dep't 2007).[21] "The Court of Appeals long ago established that a statement made in the course of legal proceedings is *absolutely* privileged if it is *at all pertinent* to the litigation." *Mosesson v. Jacob D. Fuchsberg Law Firm*, 257 A.D.2d 381, 382 (1st Dep't 1999), *lv. denied* 93 N.Y.2d 808 (1999) (citing *Youmans v. Smith*, 153 N.Y. 214, 219 (1897)) (emphasis added); *see Seltzer v. Fields*, 20 A.D.2d 60, 61 (1st Dep't 1963), *aff'd* 14 N.Y.2d 624 (1964). "The privilege is broad enough to extend to *all matters* which would be libelous if not for their introduction into an action and which *might become* pertinent at any time during the proceedings." *Mosesson*, 257 A.D.2d at 382 (emphasis added).

In other words, "an offending statement pertinent to the proceeding in which it was made is absolutely privileged, regardless of any malice, bad faith, recklessness or lack of due care with which it was spoken or written, and regardless of its truth or falsity." *Sexter & Warmflash*, 38 A.D.3d at 172 (citations and internal quotation marks omitted). "It is only when the language used goes beyond the bounds of reason and is *so clearly impertinent* and *needlessly* defamatory as not to admit of discussion that the privilege is lost." *Id.* (emphasis added; citation omitted). The rule reflects "the public policy to permit persons involved in a judicial proceeding to write and speak about it freely among themselves," *id.* at 172, as "the due administration of justice requires that the rights of clients should not be imperiled by subjecting their legal advisers to the constant fear of suits for libel or slander." *Youmans*, 153 N.Y. at 219-20.

"The test for whether a statement is pertinent is [therefore] extremely liberal; the offending statements need be neither relevant nor material to the threshold degree required in

[21] *Front, Inc. v. Khalil*, 24 N.Y.3d 713 (2015), partially abrogated *Sexter & Warmflash* to the extent that pre-litigation statements related to anticipated or prospective litigation are entitled to a qualified privilege, not the absolute privilege that immunizes statements made in the course of actual litigation. *See* 24 N.Y.3d at 718-20. That partial abrogation is not relevant here, because the Schwitzer Defendants' counterclaim pertains only to statements made in a complaint that has been served and filed, i.e., an actual (as opposed to prospective) judicial proceeding.

other areas of the law, and the barest rationality, divorced from any palpable or pragmatic degree of probability, suffices." *Pomerance v. McTiernan*, 51 A.D.3d 526, 528 (1st Dep't 2008) (citation and internal quotation marks omitted); *see Mosesson*, 257 A.D.2d at 382 ("[A]ll that is required for a statement to be privileged is a *minimal possibility* of pertinence[.]") (emphasis added); *Seltzer*, 20 A.D.2d at 63 (quoting 53 C.J.S. Libel and Slander § 104(c)(b)) ("[T]he privilege embraces anything that *may possibly be* pertinent or which has enough appearance of connection with the case so that a reasonable man *might* think it relevant.") (emphasis added).[22]

Accordingly, the question of whether a statement "may possibly be pertinent" (*id.*) and is therefore protected by the absolute litigation privilege "is a question of law for the court to decide." *Mosesson*, 257 A.D.2d at 382; *see People ex rel. Bensky v. Warden of City Prison*, 258 N.Y. 55, 60 (1932). It is, therefore, "properly determinable on a motion to dismiss addressed to the pleadings and documentary evidence alone." *Sexter & Warmflash*, 38 A.D.3d at 173. Given the nature of the Plaintiff's causes of action, and particularly in light of the Plaintiff's supplemental submissions, there can be no doubt that the allegations in the Complaint are pertinent to this judicial proceeding. *See Mosesson*, 257 A.D.2d at 382 ("All doubt is to be resolved in favor of relevancy and pertinency."). Stated simply, the Schwitzer Defendants' counterclaim is barred by the common-law litigation privilege.

The counterclaim is also barred by New York Civil Rights Law § 74, which precludes an action for defamation "against *any* person, firm or corporation," including lawyers and parties, "for the publication of a fair and true *report* of any judicial proceeding" (emphasis added). *See Cordell-Reeh v. Nannies of St. James, Inc.*, 13 A.D.3d 140, 140 (1st Dep't 2004); *Branca v.*

[22] In the context of the absolute litigation privilege, pertinence is a lower threshold than the evidentiary standards of relevance or materiality. *See Pomerance*, 51 A.D.3d at 528 (quoting *Sexter & Warmflash*, 38 A.D.3d at 173) (offending statements "need be *neither relevant nor material*" to the subject litigation) (emphasis added); *Seltzer*, 20 A.D.2d at 63 ("[S]trict legal materiality or relevancy is not required to confer the privilege.").

Mayesh, 101 A.D.2d 872, 873 (2d Dep't 1984), *aff'd* 63 N.Y.2d 994 (1984). Although public statements "about judicial proceedings" might not be protected by the absolute litigation privilege, they are nonetheless protected by the statutory fair-reporting privilege. *Soumayah v Minnelli*, 19 A.D.3d 337, 337 (1st Dept 2005); *see Lacher v. Engel*, 33 A.D.3d 10, 17 (1st Dep't 2006). Notably, the Schwitzer Defendants' counterclaim does not allege that the *reporting* of this proceeding was unfair or untrue, attacking only the proceeding itself (i.e., the allegations in the Complaint). (*See* Answer at 17-19.)

There is only one exception to the foregoing privileges, and it is a limited one: the "sham" doctrine, which provides that a judicial proceeding, or a report or account thereof, that was "maliciously instituted" for the *sole* purpose of defaming, meaning, publicizing "false and defamatory charges" against, another person, is not privileged. *Williams v. Williams*, 23 N.Y.2d 592, 598-99 (1969); *see WA Rte. 9, LLC v. PAF Captial LLC*, 136 A.D.3d 522, 522 (1st Dep't 2016); *Flomenhaft v. Finkelstein*, 127 A.D.3d 634, 638 (1st Dep't 2015); *cf. Bridge C.A.T. Scan Assocs. v. Ohio-Nuclear, Inc.*, 608 F. Supp. 1187, 1194-95, 1197 (S.D.N.Y. 1985) (exceptions to both fair-reporting and litigation privileges hinge on the existence of "sham" litigation).

The affidavits, written statements, recording transcripts, and telephone records submitted herewith utterly preclude any possibility that the "sham" (or "impertinence") exception to either the absolute litigation privilege or the statutory fair-reporting privilege apply here. Simply put, Ginarte did not invent the factual allegations in the Complaint. The allegations made herein are the result of a thorough and careful investigation, which included and produced the supplemental materials submitted herewith, into conduct that was causing and continues to cause real economic harm to Ginarte's business. The Complaint is not a "sham." And the Schwitzer Defendants' request for punitive damages is ludicrous, as it cannot plausibly be argued that

Ginarte's "*sole* motivation for" instituting this lawsuit "was a malicious intent to inflict harm on the" Schwitzer Defendants. *Patrick v. G2 FMV, LLC*, No. 152318/2015, 2016 WL 320622, at *9 (Sup. Ct. N.Y. County Jan. 27, 2016), *aff'd* 147 A.D.3d 700 (1st Dep't 2017) (emphasis added). Accordingly, the Court should dismiss the counterclaim.

CONCLUSION

Based on the foregoing, the Court should deny the Schwitzer Defendants' motion to dismiss; dismiss the Schwitzer Defendants' counterclaim for defamation *per se* as barred by the applicable privileges; and grant such other and further relief as the Court deems just and proper.

Dated: Uniondale, New York
March 22, 2019

Respectfully submitted,

Clifford S. Robert

CLIFFORD S. ROBERT
MICHAEL FARINA
ROBERT & ROBERT PLLC
526 RXR Plaza
Uniondale, New York 11556
(516) 832-7000
Attorneys for Plaintiff
Ginarte Gallardo Gonzalez
& Winograd, LLP.